

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

NO - 77-6015

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

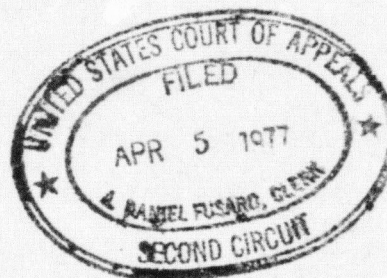
GEORGE WHITE, on behalf of
himself, and all others
similarly situated,

Plaintiff-Appellee,

V.

DAVID MATHEWS, Secretary of
the Department of Health,
Education and Welfare, as an
individual and in his official
capacity,

Defendant-Appellant



APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GEORGE WHITE, on behalf of himself)
and all others similiary situated,)
Plaintiff-Appellees,)

V.)

NO. 77-6015

DAVID MATHEWS, Secretary of the)
Department of Health, Education)
and Welfare, as an individual)
and in his official capacity,)
Defendant-Appellant)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEES

I.

PRELIMINARY STATEMENT

This is an appeal taken from the judgment rendered by the Honorable T. Emmet Clarie, Chief Judge, United States District Court for the District of Connecticut on October 29, 1976. The District Court's opinion is unreported.

II.
QUESTIONS PRESENTED

- A. Whether this action was precluded because of:
1. Mootness
 2. No subject matter jurisdiction
 3. Improper class certification
- B. Whether the delays experienced by those petitioning for Administrative Law Judge hearings were violative of the Social Security Act and the Administrative Procedure Act.
- C. Whether the extensive delays experienced in receiving a hearing and the rendering of a decision before an Administrative Law Judge constituted a denial of due process.
- D. Whether the District Court should have deferred to the Agency and Congressional efforts to rectify the extensive delays.
- E. Whether the District Court erred in ordering a penalty payment if the defendant failed to render a decision within the ordered time limits.

III.
STATEMENT OF THE CASE

Plaintiff, George White (Appellee), brought this class action on behalf of all residents of the State of Connecticut to seek declaratory and injunctive relief under the Old Age, Survivors, and Disability Program, 42 U.S.C. §401 to secure "rights and privileges abridged by the failure of the ... Social Security Administration to schedule 'Administrative Law Judge hearings' promptly; and to conclude the matter 'within a reasonable time'". (App. 6). The plaintiff alleged that the long delays in the scheduling and rendering the final decision of the statutorily required disability hearings violated the purpose of the Social Security Act, the specific congressional language authorizing said hearings, and section 5 U.S.C. 555(b) of the Administrative Procedure Act which states in part:

"With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it."

Plaintiffs further alleged that the protracted delays cause them extreme hardship and violated the Due Process Clause of the Fifth Amendment of the United States Constitution.

The court took jurisdiction under §1361, and although brought as a class action from the outset, the plaintiff filed a motion for a class action on March 21, 1975, which was granted on July 18, 1975, which included:

"the plaintiff's motion, pursuant to Rule 23, Fed. R. Civ. P., requesting a class action, which would include as plaintiffs all potential Social Security Disability recipients, who have pending petitions for a hearing before the Administrative Law Judge and have not had a hearing scheduled promptly and the matter concluded within a reasonable time, is granted. So ordered." (App. 48a)

The parties then filed cross motions for summary judgment and the District Court ruled on the plaintiffs' behalf holding that delays complained of violated the plaintiff's due process, the Social Security Administration, and the Administrative Procedure Act, entering an order that the defendant's conduct hearings and issue written decisions within the following time limits:

1. For requests filed before December 31, 1977, - 180 days.
2. For requests filed on or after December 31, 1977, but before July 1, 1978, - 150 days.
3. For requests filed on or after July 1, 1978, - 120 days.

The District Court also ordered prospective payments to those claimants who fail to receive their final decision within the maximum delays expressed above. (App. 116a).

Defendant then moved for a reconsideration of paragraph 2 of the District Court's order of prospective payments^{1/}, which was denied on November 12, 1976. The defendant thereafter appealed to this Court.

^{1/} No member of the class will be presumptively eligible until December 31, 1977. The defendant must have taken over 180 days to hear and decide the claimant's request for a hearing. Further, the court's order excludes any retroactive award and allows the defendant a right of recovery against the wage earner.

IV.
STATEMENT OF FACTS AND BACKGROUND OF
THE CONTROVERSY

A. The current procedures for acquiring or terminating Social Security disability insurance benefits.

Congress in the year of 1956, established a program to provide disability insurance for workers. 70 Stat. 815, 42 U.S.C. 423(A). This program is financed by revenues from employers and employees' payroll taxes that are paid into a separate disability insurance trust fund (26 U.S.C. 3101(A), 3111(A); 42 U.S.C. 401(b)). The focus of the program is to provide monthly benefits for a disabled person who has worked sufficiently to have an insured status (42 U.S.C. 423(c) (2)) and who has had substantial work experience in a specified period of time preceding the amount of disability. At age 65 a disabled worker's benefits are automatically converted to retirement benefits, (42 U.S.C. 416(i)(2)(D), 423(A)(1)), payable regardless of whether the worker remains under a disability thereafter. Prior to age 65, the worker is entitled to disability benefits only so long as he remains disabled.

Thus the wage earner must establish an initial and continued entitlement to acquire the benefits. Further, the wage earner must prove "disability" within the meaning of the Act by furnishing "such medical and other evidence of the existence thereof as the secretary may require". 42 U.S.C. 423(d)(5). To prove the disability, the worker must demonstrate that he or she is unable -

to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months * * *. [42 U.S.C. 423(d)(1)(A).]

In satisfying this test, the worker must demonstrate, by means of "medically acceptable clinical and laboratory diagnostic techniques" (42 U.S.C. 423(d)(3)), that he or she has a physical or mental impairment, as defined in the Act (42 U.S.C. 423(d)(3)), that is of such severity that

he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. [42 U.S.C. 423(d)(2)(A).]

Under the Social Security Administration, the program does not recognize degrees of disability; the wage earner must at all times be disabled. The amount of benefits is not related to the nature or extent of the disability. Thus, the level of benefits is based solely upon the wage earner's average monthly wage, age, and other factors as specified in 42 U.S.C. (Supp. III), 415.

B. The process of receiving disability payments

In order for a wage earner to become a recipient of disability insurance, they must file an initial application at their local

Social Security Administration Bureau. Based upon the documents submitted by the wage earner, and hopefully their doctors, the applicant is either accepted or denied his/her claim for disability. In 1960 there were 750,000 disabled workers in the United States. The figures for 1973 were 2,016,626 disabled workers receiving monetary disability insurance benefits totaling \$4.7 billion annually. Committee Staff Report on the Disability Insurance Program, Id at 313. (Exhibit A)

If the wage earner is unsuccessful in being declared disabled, he can ask for a redetermination hearing. This hearing must be requested by the wage earner within sixty (60) days from the date of the mailing notice of the initial determination.

Upon the redetermination, the wage earner has the opportunity to submit further medical evidence. If the wage earner is unsuccessful on the reconsideration hearing, he may request a hearing before an Administrative Law Judge. Both the initial determination and the reconsideration decision is made by the Social Security Bureau without benefit of testimony of the wage earner or a formal hearing. It is only when an Administrative Law Judge hearing is held that the Social Security Bureau takes into consideration the wage earner's physical being. This first subjective confrontation test before an Administrative Law Judge results in a reversal rate in excess of 50 percent. (App. 95a).

If the claimant is unsuccessful at the Administrative Law Judge level, he may request the Appeal Council to review the decision.

within sixty days. Finally, if he is still unsuccessful, he/she has sixty days in which the wage earner may file in the United States District Court. However, this instant action deals primarily with the Administrative Law Judge hearing process and the attendant time delays.

C. THE PLAINTIFF'S -

George White, a 55 year old man, applied for and was granted disability status by the Social Security Administration in 1972. At that time he was declared disabled due to Laennec's Cirrhosis, chronic and acute pancreatitis and rectal bleeding. Mr. White's problem began during a routine recertification examination from which he was declared no longer disabled. (App. 8a) He immediately moved for a reconsideration of the Social Security Administration decision which was also denied. After receiving his denial for reconsideration, Mr. White applied for a hearing before an Administrative Law Judge to contest the denial of his reconsideration request. On July 19, 1974, the plaintiff mailed his request for the hearing. He was finally heard on April 29, 1975, approximately nine months later. The decision was rendered against him on May 21, 1975, some 306 days after his request. During the lengthy period of time, the plaintiff was forced to seek assistance from the Town of Killingly in order to survive with the barest of necessities. (App. 71a). He further suffered mental anguish and loss of self-worth during the period of delay. Plaintiff was finally declared

disabled by the Appeals Council on December 3, 1975.^{2/}

Intervenors Alice Lockwood and Helen Caldwell reflect amply the hardship that the delays complained about have brought. Mrs. Lockwood injured on the job, applied for disability assistance during March of 1974, based upon hypertension, renal artery reconstruction due to fibromuscular hyperplasia, dizziness and tachycardia. Her initial application was denied on May 8, 1974, and reconsideration denied on June 27, 1974, and September 10, 1974. Her petition for the administrative Law Judge hearing was dated October 15, 1974. On October 27, 1975, over 376 days later, she received a favorable decision reversing the previous two decisions of the Social Security Administration.

^{2/} Although George White attacked only one portion of the Social Security structure, the delay in Administrative Law Judge hearings and final decisions to the total picture was noted by Judge Clarie in footnote 46:

^{46/} While the period between the filing of a petition for a hearing before an administrative law judge and the issuance of a final decision has been the focus of this analysis, it should not be overlooked that the period of time which ensues between the termination of benefits and their reinstatement in the event of a favorable appeals result in even longer. In the case of plaintiff White, there was a six month interim between the termination of his benefits and the filing of a petition for appeal after a final agency action. This period was not included when computing the original 306 day delay, and thus the latter figure -- large as it is -- does not fully convey the deprivation which occurred.

Mrs. Caldwell's decision was rendered in only six months after her request. However, she too had to wait much longer until relief was afforded her.

The long delays experienced by the plaintiff and the intervenors was typical for the class of Connecticut residents and the nation as a whole. Defendant admitted that the national time average of delay was 195.2 days while the State of Connecticut experienced an average of 211.8 days per request. (App. 83a). Defendant further shows a steady increase upon the demands of the Social Security system.

	National Requests	Connecticut Requests
1973	54,677	380
1974	73,976	679

Couple this with a backlog optimum point of 113,000 in April, 1975, (App. 83a) and the magnitude of the problems begins to unfold.

These delays have developed over a long period of time. Applications for disability took months and even years in some instances to be processed through the multi-layered disability system. However, the defendants have told Congress and the District Court that the hearing delay problem would dramatically improve:

"It is our objective to provide every individual with a hearing decision within 90 days of the request for hearing, excluding and barring any delays caused by the individual or by the need for a consultative medical examination, two circumstances which will be their nature require more time."

Hearings before the Subcommittee on Social Security of the House Committee of Ways and Means, 94th Congress, 1st Session (1975), p. 39 (emphasis added) (Statement by Commissioner Cardwell), Exhibit B of Appendix, (hereinafter "hearing").

"By June, 1976, we expect to be able to process the Title XVI cases being heard by SSI hearing examiners within 90 days of receipt of the request for hearing. With respect to the cases which are now being handled by ALJs ..., we hope to be able to reach our goal by June, 1977 of issuing the hearing decision within 90 days of the request for hearing. The 90 day processing goal is, in our opinion, realistic." Hearings, Exhibit B, page 74).

Although the above statistics indicate an extensive delay, the cold figures fail to reflect the misery, suffering and hardship experienced by each of the petitioners for a hearing. The trauma of waiting for the faceless administration to decide a person's fate is a tragic event to experience. The claimant who feels disabled, most times legitimately and sometimes caught in a mental vortex of iatrogenic or self-induced impairment, pathetically must wait while the bureau torpidly decides their fate.

Couple this with the fact that many feel that they are only asking for something that is due them, something they worked and paid for with their own toil and blood, delay looms large. As stated in the Magna Carta:

"To none will we sell, to none deny, to none delay, either right or justice." Chapter 29.

D. Causes of the Hearing Delay Problem.

The plaintiff basically agrees with the defendant on the basic causes of the delay and will not recite the same reasons as indicated in defendant's brief, pages 4-6.

However, plaintiff feels he should supplement briefly defendant's arguments. In retrospect, the plaintiff's most efficient period of processing Administrative Law Judge requests to decision was in 1968-69, when the time required was a mere 95 days. (Hearings, Exhibit B of Appendix, page 39). Here the defendant has never achieved the agency's fundamental objective, ". . . to provide every individual with a hearing decision within 90 days of the request for hearings, excluding and barring any delays caused by the individual or by the need for a consultative medical examination, two circumstances which will by their nature require more time." (Hearings, Exhibit B of Appendix, page 39).

From 1969 onward, the demand for hearings increased dramatically nationwide.

Fiscal Year 1970 -	42,573
Fiscal Year 1974 -	76,281
Fiscal Year 1975 -	99,200
April 1975 -	113,000

Couple this with new programs, lack of ability in recruiting new judges and the pattern of backlog easily develops. From the

problems of the State of Connecticut to the nation, it is easy to understand the concern of Congress and the public as to whether the Social Security Administration is still able to effectively function as envisioned by Congress.

THE LENGTHY DELAYS TOLERATED BY THE APPELLANT VIOLATE
THE INTENT OF THE SOCIAL SECURITY ACT

The purpose of the Social Security Act is "the protection of our people from economic destitution and resort to charity as a result of a disabling accident or injury". Stewart v. Cohen, 309 F. Supp. 949, 954 (E.D.N.Y. 1970).

The program is financed by revenues derived from employee and employer payroll taxes. 26 U.S.C. §3101(a), 3111(a); 42 U.S.C. §410(b). It provides monthly benefits to disabled persons who have worked sufficiently long to have an insured status, Id. §423(c)(1)(A), and who have had substantial work experience in a specified interval directly preceding the onset of disability. Id. §423(c)(1)(B). Benefits are also provided to the worker's dependants under specified circumstances. Id. §402(b) - (d). When the recipient reaches age 65, his disability benefits are automatically converted to retirement benefits. Id. §416(2)(D), 423(a)(1). In fiscal 1974 approximately 3,700,000 persons recieved assistance under the program. Social Security Administration, The Year In Review 21(1974). Mathews v. Eldridge, 424 U.S. 319, footnote 1.

Cash benefits are to be provided to workers during periods in which they are completely disabled. Eldridge, supra, page 323 (emphasis added). "During" means "throughout the continuance of; also, in the course of." The New Century Dictionary, Appleton-Century-Crofts, Inc., New York, 1952, p. 469. The current state of

affairs which in the named and intervening plaintiffs' cases resulted in at least a year of deprivation of their social security benefits, a year during which they were both disabled within the meaning of the act, violates the purpose of the Social Security Act because benefits are, in fact, not being provided during periods of disability. Simply put, they are and have been provided after periods of disability. The specific purpose of the Statute has been thwarted by the failure of the Secretary to act.

- A. 42 USC §405(b) can not be said to grant exclusive discretion to the Secretary when his exercise of that discretion thwarts the intent of the Act.

The Secretary would have us believe that he alone should be the judge of what length of delay should be tolerated in the hearings procedure specifically mandated by Congress. 42 U.S.C §405(b). Certainly he appears to have been granted broad authority to set procedures 42 U.S.C. §405(a). However, he can not be permitted to perpetuate and tolerate a situation which defeats the purposes of the Act he is to administer. The Court, in Eldridge, supra, p.342, characterizes the procedures leading up to a hearing and decision as "torpid", i.e. numb, inactive or slow and dull. In simple terms the Supreme Court has recognized the Secretary and his employees as not doing their job as it is cast under the Act. A situation can not be called torpid unless in comparison to some abstract standard of what is proper, alert and sensible under the

circumstances. Significantly, the Court, in its characterization of the procedures as torpid, makes reference to Fusari v. Steinberg, 419 U.S. 379, 42 L.Ed2d 521, 95 S.Ct. 533(1975) in which, at footnote 15, the Court stated:

Any statutory requirement that embodies motion of timeliness, accuracy, and administrative feasibility inevitably will generate fact-specific applications... For example, the delay in resolving administrative appeals is considerably greater in Connecticut than in the New York system, where administrative appeals were resolved in an average of 45 days...

Further in the same footnote the accuracy of the procedures was also specifically made relevant to the inquiry into delay by the Court.

It is most significant that the Court acted as it did in Fusari. While remanding the case to the District Court for reconsideration in light of new State legislation it took the opportunity to reaffirm the position it had taken in California Human Resources Dept. v. Java, 402 US 121, 130-133, 28 L.Ed.2d 666, 91 S.Ct 1347(1971) which appeared to have been eroded by its summary affirmance of Torres v. New York State Department of Labor, 405 US 949, 31 L Ed 2d 228, 92 S.Ct. 1185(1972). The Java case (and, by implication, Fusari) held that Unemployment Compensation benefits payable under 42 U.S.C. §501 et.seq. a portion of the Social Security Act, were payable so as to get money into the pocket of the unemployed worker at the earliest point administratively feasible, and that a California system which imposed extensive delays in certain instances tended to frustrate the

congressional objective. It is important to note that the California administrative system found to frustrate the statutory intent had been certified by the Secretary of Labor as acceptable, at 125.

Java, supra., thus stands foreshadowing for the principle that the approval by the chief administrator (i.e., the Secretary of Labor) of a specific system of benefit payment and control means very little when the evil which the statute in question was enacted to remedy is not being attacked and the statutory scheme has become a hollow promise.

The statutory schemes in the Java case (42 U.S.C. §503(a)(1)) and the instant matter are analogous in that both schemes grant to the respective Secretary's extensive administrative judgment. Yet the Court found the Secretary's judgment no impediment to its decision that the California scheme thwarted congressional intent.

There can be no question about the enormous harm caused by the backlog of cases the Secretary would have us believe is acceptable. In his own memo in support of his motion for summary judgment the defendant quoted the findings of the Senate Finance Committee:

The committee believes that most beneficiaries are dependent on their Social Security payments to meet their everyday needs and that assurance of prompt payment is vital to their financial well-being.
(Defendant's memo, p. 18).

If assurance of prompt payment is vital to one's well-being, an eight month delay must be seen as enormously harmful. The plaintiffs' affidavits, in the records of the District Court, vividly point out the hardships the the defendant caused. Both plaintiffs have had to exhaust their meager assets and borrow subsistence funds from their towns. (Affidavit of plaintiff George White, Appendix, p.70a; Affidavit of plaintiff Alice Lockwood, Appendix, p. 80a). Both plaintiffs, wage earners who paid into Social Security for many years, had to beg for their survival while the Secretary perpetuated an administration of the disability program which mistakenly denied them their property - the benefits they had paid for - and took over a year to correct its errors. Meanwhile, the towns of Killingly and Norwich and the State of Connecticut were obliged to expend taxpayer's money to keep the plaintiffs alive.

- B. The lack of mandated time limits in 42 U.S.C §405 (a) and (b) does not permit the Secretary to allow lengthy delays in processing hearings.

The Secretary would have this Court believe that he is empowered to set up any scheme to operate the disability insurance program simply because Congress has not put specific time limits into the Act. This argument is specious. The Act specifically states that the Secretary shall make rules and regulations and

and establish procedures not inconsistent with the provisions of the subchapter (II, 42 U.S.C. §§401 and following) which are appropriate to carry out the provisions and shall adopt reasonable and proper administrative rules and regulations. (42 U.S.C. §405 (a)). In addition, in 42 U.S.C. §405(b), the Secretary is directed to provide reasonable notice and opportunity for a hearing. Surely the Secretary could not be allowed to permit five years to pass prior to a requested hearing. Such a situation would completely foreclose many eligible recipients and would be completely unreasonable. The Act, 42 U.S.C. §423, which creates disability insurance is set in the present tense and provides insurance to a person who, among other requirements, is under a disability. The Act does not say was; it says is.

The appellant, with great ingeniousness, puts forward the argument that "Congressional concern with accurate adjudication" has eliminated any specific time requirement and left the process up to the discretion of the Secretary. Yet, a careful examination of the testimony reveals that the Secretary makes a large number of mistakes as his agency wends its torpid way toward decision. Were it not for the mistakes there would be no need for a hearing. In fact, in the case of plaintiff White the long delayed hearing decision was

reversed by the Appeals Council because it was erroneous. Based on the present number of reversals during ALJ hearings which is better than 50% the present quality and uniformity of the initial decision and reconsiderations must be questioned.

The testimony of Mr. Cardwell (Appeals, Exhibit 2) indicates that he feels the hearing is the most significant input into the present problem. He also talks of the face-to-face portion in a diametrically opposite manner than that of his counsel. If his counsel were to be believed he would relegate the "human input" of the face-to-face hearing to objective obscurity. (See defendant's memo pp. 9-11). The plaintiff in his brief for summary judgment indicated his belief of the importance and necessity of the ALJ hearing which allows the humane factor to enter the proper work vacuum. The secretary in his brief has never doubted the importance and need of the hearing, he just wants to schedule them at his agency's convenience. In his testimony before Congress Commissioner Cardwell addressed the face-to-face issue in depth:

As the staff report has pointed out to the committee, we have also been testing a new procedure of face-to-face interviews between the claimant and the decisionmaker before the case gets to a hearing. It offers the claimant, whose application was denied and who requested reconsideration, the opportunity to discuss his case fully and completely with a State agency decisionmaker.

By involving the claimant more fully in the decision making process at that level, we hope to identify, at an earlier point in time, those claims that should be paid. (Appeals pp. 44).

The Secretary offers this Court many reasons for the present delays in deciding ALJ cases. However, each reason cannot be held to be sufficient when compared to the harm caused to the potential recipients.

c. The failure of Congress to set mandatory time limits does not preclude the Court from doing so.

The argument appellant makes at page 15 and following of his brief that the failure of Congress to set mandatory time limits precludes this Court from acting and leaves the entire matter to the discretion of the Secretary is foolish. Such a reading would tear the heart and soul out of the sections of the Act which provide payments to persons during disability and which provide for reasonable notice and opportunity for a hearing. This Court, as many courts before it, is exactly the proper forum to determine whether the unconscionable delays of the Secretary erode or alter the abstract standards of the Social Security Act.

Congress intended to have the Secretary do a quality job. It intended that job to be done so as to provide the benefits to the eligible disabled during periods of their disability. The Secretary would hide behind this delegation of responsibility and attempt to

justify his unreasonable delays. Yet, there is no indication that the Secretary is doing a quality job (an allegation both plaintiffs would wish to contest), that the whole delay time is the result of ongoing, vigorous investigations in each case (which both plaintiff White and intervening plaintiff Lockwood would contest as all the information used to make their hearing decisions was in the files for months prior to the decision) or that the delay is the result of uncontrolled factors beyond the reach of the Secretary.

The appellant, by his caption to argument I(A)(1)(b), maintains that "Congress has concluded that no unreasonable delay exists". On the contrary, Congress has seen that a very serious delay problem exists. Nothing cited in the appellant's brief supports his contention that the situation is to be considered satisfactory. Congress provided long ago that the Secretary should provide "reasonable notice and opportunity for a hearing". 42 U.S.C. 405(b). The Congress was induced not to act by its acceptance of what it thought were the considered, reasonable representations by the defendant that the delay crisis would be cleared up by June of 1977. (Appeals, Exhibit 2, p. 39, 74). It is now April of 1977 and the mean delay times are 263 days in the New England Region. When the defendant's answered plaintiffs' first set of interrogatories the average delay between a request for a hearing

and a decision was 211.8 days (Stipulation of Facts, Joint Appendix, p. 82a, #14). The delays have increased even though almost all of the "remedies" proposed by the defendant have been put into operation. The defendant's representations at page 4 and following of his brief before this Court are not responsive to the issue of delays in obtaining ALJ hearings and decisions. He speaks glowingly of the efforts of the Secretary to reduce the backlog but ignores the fact that the delays are getting longer and longer. These excuses are the same as those put to Congress in 1975 (Appeals, Exhibit 2). The noble remedies of the Secretary have not resulted in the cures he so casually promised. (Appeals, Exhibit 2, page 39 et.seq.).

The defendants argue that Congress has decided that no "unreasonable" delay exists solely because Congress passed an emergency, interim law to help solve the problem. It is a strange theory of statutory construction that maintains that Congressional response to a problem somehow implies approval of that problem. Congress's first response to this bureaucratic morass has been to straighten out the destructive debate over the precise status of the various disability judges.

The defendant's main source of this "implied" approval of past delays is a House Staff Report. First, that report does not say that it approved of the past delays or found them reasonable. It only said that the staff felt that Congress should not create a

time limit with immediate payment if that limit is exceeded. Staff discussion of what is an appropriate emergency Congressional remedy has nothing to do with whether or not Congress approved of the delays. Nor does recommending a different remedy than the one proposed by the plaintiffs imply that the delays were "reasonable" or that this Court is precluded from using the remedy proposed by the plaintiffs.

The recent change in the statute shows that Congress was upset with the workings of the current appeals system; that there were unreasonable delays; and that something had to be done immediately. This Court should also note the caveat on the front page of the Staff Report: "Note - this document has been printed for information purposes only. It has not been considered or approved by the committee." Congress's refusal to afford more relief was in part a political decision to assure immediate relief. The defendant had gotten themselves into a mess that Congress has begun to help them get out of. The change in the law only reflects what Congress felt it could do immediately to help solve the problem.

The recent Congressional amendment supports the plaintiffs' basic contention that Congress intended that hearings be processed within a reasonable time, and that the defendants had failed to perform that statutory duty in the past. The current Act only

reaffirms and defines more clearly the basic Congressional purpose that all Social Security hearings must be processed quickly. Nowhere in the new Act does Congress state or imply that this reform was the sole conceivable or allowable remedy. Nowhere does Congress imply that the Courts cannot also study the problem and provide additional forms of relief.

The basic rules of statutory construction also support the plaintiffs' reading of the Act: "But when the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it." Hamilton v. Rathbone, 175 U.S. 414, 419 (1899). Congress' clear intention to provide for "... reasonable notice and opportunity for a hearing.." can only be read to require that hearings be processed within a reasonable time.

VI.

FAILURE TO PROVIDE TIMELY HEARINGS AND TO RENDER DECISIONS WITHIN 90 DAYS VIOLATES THE ADMINISTRATIVE PROCEDURE ACT

The Administrative Procedure Act requires that an agency act "within a reasonable time ... to conclude matters presented to it ..." 5 U.S.C. §555(b). The Act mandates that a court "shall ... compel agency action withheld or unreasonably delayed ..." 5 U.S.C. §701(1). While the Supreme Court has never definitely held that the Administrative Procedure Act applies to the Social Security Administration, see Richardson v. Perales, 402 U.S. 389, 409 (1971),

the Act by its terms covers the actions of an "agency", which is defined as "each authority of the Government of the United States". Within the definition of "agency action" is included an agency's "failure to act". 5 U.S.C. §551. The Act has been specifically held by the Second Circuit Court of Appeals to apply to actions of the Social Security Administration. Kingsbrook Jewish Medical Center v. Richardson, 486 F.2d 663, 666 (2d Cir. 1973); Aquavella v. Richardson, 437 F.2d 397, 402 (2d Cir. 1971); Rosado v. Wyman, 414 F.2d 170, 181 (2d Cir. 1969) (concurring opinion by Judge Lombard), reversed on other grounds, 397 U.S. 397 (1970) Cappadora v. Celebrezze, 356 F.2d 1, 6 (2d Cir. 1966). The applicability of the Act to actions of the Secretary of Health, Education and Welfare has been held to be the law of this District by Judge Newman in Connecticut Union of Welfare Employees and Richard v. White, 357 F. Supp. 1378, 1379 (D. Conn. 1973).^{3/}

^{3/} See also: Ruiz-Olan v. HEW, 511 F.2d 1056, 1058 (1st Cir. 1975); Rothman v. Hospital Service of Southern California, 510 F.2d 956, 959 (9th Cir. 1975); Maddox v. Richardson, 464 F.2d 617, 620 (6th Cir. 1972); Woods v. Richardson, 465 F.2d 739, 741, (6th Cir. 1972); McInnis v. Weinberger, 388 F. Supp. 381, 388 (D. Mass. 1975); Negron v. Secretary of HEW, 382 F. Supp. 913, 914 (D. Puerto Rico 1974); Anderson v. Weinberger, 380 F. Supp. 364, 370 (D. Md. 1974); Chenoweth v. Weinberger, 376 F. Supp. 1338, 1342 (W.D. Mo. 1974); Mt. Sinai Hospital of Greater Miami v. Weinberger, 376 F. Supp. 1099, 1107 (S.D. Fla. 1974); Feeko v. Weinberger, 364 F. Supp. 740, 743 (E.D. Pa. 1973); Temple Univ., Etc. v. Associated Hosp. Serv. of Phila., 361 F. Supp. 263, 269 (E.D. Pa. 1973); Polansky v. Richardson, 351 F. Supp. 1066, 1068 (E.D. N.Y. 1972).

The court in Deering Milliken, Inc. v. Johnston, 295 F.2d 856 (4th Cir. 1961), in upholding the plaintiff's challenge of delays in proceedings of the National Labor Relations Board, held that the Act's provisions in §555(b) are mandatory, "an enforceable command made expressly so by §10e"[5 U.S.C. §706(1)] of the Act, under which "the courts have the right and the duty" to compel an agency to proceed "with reasonable dispatch". Id. at 863-4. The court reaffirmed the jurisdiction of a federal court to compel administrative action wrongfully withheld in violation of a statutory duty to act and cited a long string of precedent originating with Marbury v. Madison, 1 Cranch 137, 5 U.S. 137 (1803). The Milliken court describes the mandate of §706(1) as "an affirmative statutory declaration of the congressional purpose that the requirement [of §555 (b)] gives rise to legally enforceable rights of parties to the proceeding". Supra at 863.

The review in Milliken of the legislative history of the Act supports this statement of purpose: The committee report in the Senate^{4/} states that the requirement of §555(b) is a "legal requirement" that an agency shall not deny relief or fail to conclude a case by mere inaction. Similarly, the report of the committee in the

^{4/} Administrative Procedure Act, Legislative History, S.Doc. No. 248, 79th Cong., 2nd Sess., 204-205.

House^{5/} says that no agency

shall in effect deny relief or fail to conclude a case by mere inaction, or proceed in a dilatory fashion to the injury of the person concerned. No agency should permit any person to suffer injurious consequences upon unwarranted official delay.

During debate on the floor of the Senate, the author of the bill which was to become the Administrative Procedure Act, Senator McCarran, declared that the intention of the bill, in the absence of any other adequate, available remedy, was to give a party injured by a violation of one of the terms of the bill the right of enforcement by the extraordinary remedies of injunction, prohibition, and quo warranto.^{6/} This Circuit, in Cappadora v. Celebrezze, supra in affirming the Act's applicability to actions of the Defendant Secretary of Health, Education and Welfare, stated at page 6:

Absent any evidence to the contrary, Congress may rather be presumed to have intended that the courts should fulfill their traditional role of defining and maintaining the proper bounds of administrative discretion and safeguarding the rights of the individual.

In F.T.C. v. J. Weingarten, Inc., 336 F.2d 687(5th Cir.1964), the court, while ruling that the Federal Trade Commission on the particular facts of the case had not violated the Act's requirement that matters be concluded within a reasonable time, asserted that

^{5/} Legislative History, 263-264.

^{6/} Legislative History, 326-327, 217, 278-279, 281-282.

"all Courts in a supervisory role are concerned with delay" and that "agencies must exert the greatest resourceful, imaginative ingenuity in devising procedures which in a day of ever-expanding dockets will permit the regulatory process to function properly with reasonable dispatch". Id. at 691-2. The performance of the defendant herein as reflected in his responses to the plaintiff's motions for discovery demonstrates that no meaningful efforts have been made to eliminate the unreasonable delays challenged by the plaintiff. To compel the plaintiff and those members of the class similarly situated who have applied for Social Security disability benefits to wait for periods usually in excess of a year for hearing decisions to be made on their applications is tantamount to a denial to these people of an adequate source of income with which to feed, house, and clothe themselves and their dependents. This situation is contrary to the "basic purpose" of the Social Security Act: "the protection of our people from economic destitution and resort to charity as a result of a disabling accident or illness." Stewart v. Cohen, 309 F. Supp. 949, 954 (E.D. N.Y. 1970). Justice Douglas stated the point succinctly in his dissenting opinion in favor of granting certiorari in Bailey v. Weinberger, 419 U.S. 953 (1974):

For the extent to which the ever-growing federal bureaucracy uses "discretion" to mask irresponsible action that evades review seems to me to be eroding basic rights of the citizen.

A crucial ramification of the defendant's delays in the scheduling of administrative law judge hearings and in the issuance of hearing decisions is that the opportunity that the applicant has to appeal an adverse decision to federal court under the Social Security Act, 42 U.S.C. §405(g) is thereby also delayed. The total effect of the delay is, therefore, a denial to the plaintiff and the class he represents of the review contemplated by the Social Security Act, 42 U.S.C. §§405(g) and (h), which provides for exclusive and limited review of the defendant's denial of a claim for benefits only following a final decision by the defendant. Weinberger v. Salfi, 421 U.S. 794. Particularly in light of the Salfi opinion, it seems to be incumbent upon the defendant to ensure that the unreasonable delays challenged herein are eliminated so that the final decision of the defendant required by Salfi prior to judicial review will be rendered within a reasonable period of time. Otherwise, the challenged delays are tantamount to the denial of claims without recourse to review to the plaintiff and the class he represents.

Chief Judge Bazelon of the Court of Appeals of the District of Columbia, in Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970), cited the provision of the Administrative Procedure Act prohibiting unreasonable agency delay and ordered the Secretary of Agriculture to respond within thirty days with information pertaining to the plaintiff's petition seeking cancellation of a

registration for DDT. Judge Bazelon anticipated with great clarity the ramifications of the Salfi decision as it pertains to administrative delays when he stated at page 1099:

[w]hen administrative inaction has precisely the same impact on the rights of the parties as denial of relief, an agency cannot preclude judicial review by casting its decision in the form of inaction rather than in the form of an order denying relief. International Ass'n of Machinists and Aerospace Workers, AFL-CIO v. National Mediation Board, 138 U.S. App.D.C. 96, 104,425, F.2d 527,535 (1970); Kessler v. FCC, 117 U.S. App. D.C. 130, 141, 326 F.2d 673, 684 (1973); Deering Milliken, Inc. v. Johnston, 295 f.2d 856 (4th Cir. 1961); American Broadcasting Co. v. FCC, 89 U.S. App. D.C. 298, 191 F.2d 492 (1951).

The criterion for deciding whether relief is appropriate under the Administrative Procedure Act is whether or not agency action is "unreasonably delayed". Thus, the standard is not significantly different than under the due process clause; under both the Constitution and the Act, the test is basically one of reasonableness. The interest of the disability claimant in receiving a prompt final determination on his claim must be weighed against the burden a time limit would cause the defendant. Here, the denials to disability claimants affected by the challenged delays of the basic necessities of life for periods in excess of a year dictates that the interests of these people must prevail. The long delay in scheduling hearings is tantamount to a denial of benefits in its effect on the plaintiff and the class he represents. The defendant has not shown that the delays

are inevitable; on the contrary the delays could be eliminated at least in part with little effort . In Environmental Defense Fund, Inc. v. Hardin, supra, immediate action by the Secretary of Agriculture was required by the court because of the imminent hazard to the public that could result from the agency's failure to act promptly. See also, American Public Health Association v. Veneman, 349 F. Supp. 1311 (D.D.C. 1972), holding that in view of the impact of medicinal drug regulation upon health and welfare, the court would set a deadline for the Federal Food and Drug Administration to complete its evaluation of the efficacy of drugs. The court would set a deadline for the Federal Food and Drug Administration to complete its evaluation of the efficacy of drugs. The court noted with disfavor two cases in which hearings had not been held in one-and-a half years, and pointed out that despite agency discretion in scheduling hearings, "interminable delay obviously is not contemplated". Id. at 1316.

Plaintiffs urge that no longer than a ninety day period is reasonable before a requested hearing held and a decision rendered. This period will allow adequate time to both claimant and agency to prepare. While an even shorter period is desirable, a ninety day time limit would create a substantial improvement over the current situation. (Appeals, Exhibit 2, p.39). As the court held in Cornelius v. Minter, 395 F. Supp. 616 (D.Mass 1974), "[c]ourts are uniquely suited to determining what is reasonable in such a situation [application for welfare benefits]'. See also: Like v. Carter, 448

F.2d 798 (8th Cir. 1971); Adams v. Sailer, 312 F. Supp. 923(E.D. Pa. 1970). Based on the record before the Court in this case, this Court should find that the delays which exist here are inherently unreasonable in the circumstances of the plaintiff and the class he represents and should sustain the ruling and judgment of the District Court.

VII.
THE DELAYS IN SCHEDULING ADMINISTRATIVE LAW
JUDGE HEARINGS AND RENDERING A FINAL DECISION
FAILS TO PROVIDE DUE PROCESS

As the defendant noted in his brief, Judge Clarie adopted the due process analysis used in Mathews v. Eldridge, 429 U.S. 319 (1976). The three factors applied were:

... first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the provable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Id. at 335 (Citation omitted).

After applying the factors identified above and also spending much time to determine if Eldridge, supra, applied, Judge Clarie crisply stated:

"... the existing delay in processing appeals from adverse agency action is so great as to deprive the plaintiff . . . his constitutional guarantee of ... due process." (App. 92a).

The plaintiffs argue that the District Court applied the correct analysis and that the conclusions of law reached were sound. Defendant's arguments from the Eldridge opinion are in error.

A. The Defendant's Reliance and Analysis of Mathews v. Eldridge, supra, is Misplaced.

The defendant here takes the limited decision of Eldridge, supra, and attempts to bootstrap it to a point of justifying the delay in evidence here. Defendant's argument simply stated is that because the United States Supreme Court in Eldridge, supra, found "an evidentiary hearing is not required prior to termination of disability benefits and that the present administrative procedures fully comport with due process", Mathews v. Eldridge, supra, at 349, that the entire system including the Administrative Law Judge structure is constitutional and immune from challenge:

The Court's conclusion that the Due Process Clause does not require a pretermination evidentiary hearing must be regarded as dispositive of plaintiff's constitutional attack in the instant suit. If the requirements of due process are satisfied by procedures which do not provide for an oral evidentiary hearing, it cannot be urged that a "delay" in disposition of a request for an oral evidentiary hearing amounts to a violation of the requirements of due process. (Defendant's Brief, page 26).

The above application of Eldridge, supra, loses sight of the plaintiff's, and his class, cause of action. This action is against the delays of scheduling and rendering of decisions within a reasonable period of time in the Administrative Law Judge process, the third and most important step in the Social Security disability structure. Plaintiff simply requested a hearing be held and decision be rendered within a reasonable and meaningful time. The Administrative Law Judge

hearing the plaintiff challenges, is the exclusive mechanism available for the plaintiff and his class to reverse adverse determinations on the two previous administrative procedures by the Social Security Administration. There has never been a question as to the plaintiff's right to the Administrative Law Judge hearing, nor to the defendant's duty to provide such a hearing. The availability of the hearing, contrary to the defendant's claims, is not at issue here. The defendant's duty under the Constitution and Administrative Procedure Act to render decisions within a reasonable time is the plaintiff's primary allegation. The plaintiffs further argue that the defendant's lack of standards as to what a reasonable time period in which to render an Administrative Law Judge decision is the primary cause of the current one-year delays.

The defendant in his brief has raised issues discussed in Eldridge, supra. In order to provide guidance to this court, we must look to Eldridge, supra, to see what was considered by the court. At first glance, the court's decision in Eldridge, supra, seems to address itself to White; but a further and close reading shows that the decision was based upon whether benefits could be terminated to Social Security claimants without a pretermination evidentiary oral hearing. Contrary to the defendant's assertion, Eldridge, supra, does not foreclose the due process issues raised in this case. As Justice Powell stated in Eldridge, supra:

As Eldridge's benefits were terminated because he was determined to be no longer disabled, we consider only the sufficiency of the procedures involved in such cases. Id. at 336 (Emphasis supplied).

The scope of the inquiry in Eldridge, supra, was narrowly confined to the question of the need of a full evidentiary hearing prior to termination of on-going Social Security benefits. The court's decision in Eldridge, supra, does not preclude each and every question of due process within the Social Security system. The Eldridge, supra, court examined the Social Security decision-making process in order to determine if an additional or altered structural component was required to comport with established standards of due process. The issue here is far different. Eldridge, supra, examined relevant structure and found it constitutional; here the plaintiffs allege that the structure fails to function constitutionally. This difference, is crucial to the cause of action here, and is ignored by the defendant.

As Judge Clarie stated:

... the Court finds this case differs substantially from the case in Eldridge. The nature of the personal interest alleged violated is different to begin with. While Eldridge complained of the Social Security Administration's decision to terminate his benefits without a hearing, here the plaintiff seeks to have the appeals process proceed in a more prompt fashion. (App. 105a) (Footnote omitted).

Additionally, if we follow the defendant's reasoning, all constitutional due process issues within the Social Security structure must be dismissed. The defendant has further distorted the Eldridge, supra, opinion by stating:

If the requirements of due process are satisfied by procedures which do not provide for an oral evidentiary hearing, it cannot be urged that a "delay" in disposition of a request for an oral evidentiary hearing amounts to a violation of the requirements of due process. (Defendant's Brief, page 25).

Defendant's statement, though appealing, moves from the premise that since due process is satisfied without the imposition of a new evidentiary hearing to the conclusion that the present system of granting hearings is also immune from a due process challenge. Surely, the illogic of his conclusion is very evident. For example, suppose the present hearing system averaged five years in delay for a final decision; under Defendant's theories, a due process constitutional issue would be precluded by Eldridge, supra. Further, it is the lack of standards surrounding the disability hearing structure that the plaintiff feels amounts to the alleged unreasonableness of the present delays. Eldridge, supra, was narrowly written by the court to support the present structure only to the point that the court felt no new procedures were needed to comport with due process. In discussing this narrow application, it was stated:

The dispute centers upon what process is due prior to the initial termination of benefits; pending review.
Id. at 333.

The major premise of Eldridge, supra, was not the approval on due process grounds of the entire Social Security hearing system, but the question of the need for a full hearing prior to cut-off. The defendant here argues that the Eldridge, supra, court stamped its approval on

the present hearing system, thereby eliminating the question this case addresses. Nothing could be further from the facts. To digress, let us look at the present procedures surrounding a termination.

First, the claimant receives a written communication indicating he should provide further evidence of his continued disability.

Secondly, he can have an oral interview or further medical tests by order of the Social Security Bureau. After this, if the agency determination differs from the beneficiary;

the beneficiary is informed that benefits may be terminated; provided a summary of the evidence upon which the proposed determination to terminate is based, and afforded an opportunity to review the medical reports and other evidence in his case file. He also may respond in writing and submit additional evidence.

Eldridge, supra. Id. at 337-8 (Notes omitted).

If the decision goes against the beneficiary, he then is given a de-novo reconsideration. Once termination is effective, the beneficiary is given a two-month cut-off period to press his claim. Considering the scope of the procedures already inherent within the present structure, it is not surprising that the Eldridge, supra, court failed to require another evidentiary hearing prior to termination and found the present termination procedures constitutionally adequate.

B. The Plaintiff Has a "Property" Interest in Timely Hearings and Decisions Beyond a Unilateral Expectation.

It has been repeatedly held that the Social Security Act and the administration of the program are subject to the due process clause of the Fifth Amendment.

" . . . interest of a covered employee under the [Social Security] Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause." Flemming v. Nestor, 363 U.S. 603, 611 (1960) See also Maher v. Mathews, 402 F. Supp. 1165, 1178 (D. Dela. 1975)

The defendant here argues that the present claim by the plaintiff class falls outside of due process protections. Since George White was terminated from benefits, his "property" interest must equal to that of the Eldridge. As the United States Supreme Court stated in the Eldridge decision:

The Secretary does not contend that procedural due process is inapplicable to terminations of social security disability benefits. He recognizes, as has been implicit in our prior decisions, e.g., Richardson v. Belcher, 404 U.S. 78, 80-81, 92 S.Ct. 254, 256-257, 30 L.Ed. 2d 231 (1971); Richardson v. Perales, 402 U.S. 389, 401-402, 91 S.Ct. 1420, 1427-1428, 28 L.Ed. 2d 842 (1971); Flemming v. Nestor, 363 U.S. 603, 611, 80 S.Ct. 1367, 1372-1373, 4 L.Ed. 2d 1435 (1960), that the interest of an individual in continued receipt of these benefits is a statutorily created "property" interest protected by the Fifth Amendment. Cf. Arnett v. Kennedy, 416 U.S. 134, 166, 94 S.Ct. 1633, 1650, 40 L.Ed. 2d 15 (Powell, J., concurring); Board of Regents v. Roth, 408 U.S. 564, 576-578, 92 S.Ct. 2701, 2708-2710, 33 L.Ed. 2d 548 (1972); Bell v. Burson, 402 U.S., at 539, 91 S.Ct., at 1589; Goldberg v. Kelly, supra, 397 U.S., at 261-262, 90, S.Ct. at 1016-1017. Id. at 332,

The Supreme Court has "made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattles, or money." Board of Regents v. Roth, 408 U.S. 564, 571-572 (1972). And it is equally clear that Supplemental Security Income and OASDI benefits are property entitlements subject to due process protections. Richardson v. Perales, 402 U.S. 389 (1971); Goldberg v. Kelly, 397 U.S. 254, 295-296 (1970); Board of Regents v. Roth, supra, at 576-577. Furthermore, the Court has recognized that "property may be as effectively taken by long continued and unreasonable delay" as by affirmative action by an agency, Smith v. Illinois Bell Telephone Company, 270 U.S. 587, 591-592 (1926). See also Chicago B. & O.R. Company v. Illinois Commerce Commission, 82 F. Supp. 368 (N.D. Ill. 1949). Relying on these precedents and Nelson v. Sugarman, 361 F. Supp. 1132 (S.D.N.Y. 1972), a federal court found a substantial constitutional question raised by inordinate delays in processing applications for public assistance in local welfare centers. In Perez v. Lavine, 378 F. Supp. 1390 (S.D. N.Y. 1974), the court said:

Plaintiffs argue, not without reason, that if the due process clause protects telephone companies against unreasonable delays in the provision of needed relief, it must afford similar protection to welfare recipients.

In light of the above authorities, I am compelled to conclude that the claimed denial of due process does raise a substantial constitutional question. Id. at 1395.

Defendant in his brief questions whether there is a significant "property interest" on the plaintiff's behalf to satisfy the Roth's courts due process analysis.

"To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."
408 U.S. at 577, 92 S.Ct. at 2709.

However, defendant fails to take into consideration that the plaintiffs are entitled to the hearings under 42 U.S.C. §405(b), as a statutory right, and that due process requires that they be provided in a reasonable and timely fashion. In arriving at whether procedural due process guarantees apply, the Roth court also stated:

. . . a weighing process has long been a part of any determination of the form of hearing required in particular situations by procedural due process. But, to determine whether due process requirements apply in the first place, we must look not to the "weight", but to the nature of the interest at stake. Id. at 570-571 (Emphasis in original) (Footnotes omitted)

The defendant suggests that members of the plaintiff's class who are not terminated recipients, but merely applicants have an insignificant property interest. As stated in Roth:

"Liberty" and "property" are broad and majestic terms. They are among the "[g]reat [constitutional] concepts . . . purposely left to gather meaning from experience . . . [T]hey relate to the whole domain of social and economic fact . . . Id. at 571.

Although the applicants' "property" right may be less than the recipients in Goldberg, supra, the access to the hearing itself must be sufficient to vest due process protections for the plaintiffs. As the Court stated in Richardson v. Perales, 402 U.S. 389, 399 (1971), "The social security must be fair, and it must work."

Perales is also relevant, because it held that the protections of the due process clause are available in some form to applicants for benefits. In this case the District Court held that to deny the protections of due process to those persons harmed by administrative delays would seriously undermine the value of the Fourteenth Amendment and would undercut one of its essential protections: the opportunity to be heard "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (emphasis added). This language was cited with approval in Mathews v. Eldridge, 96 S. Ct. 893, 902 (1976), and gives constitutional significance to the maxim, "Justice delayed is justice denied." Due process has no value if it does not apply to the timeliness of legal procedures. Defendants' conclusion that due process requires no more than that the scheduling of hearings be left to the discretion of the Secretary should not be tolerated.

As Judge Clarie states:

. . . it is the crux of plaintiff's suit that he cannot receive a prompt hearing, a fact, which on its face, the Secretary does not (and indeed could not successfully) dispute. (App. 101-2a).

Although the issue of delays was discussed by Eldridge, supra, court, delay was not a question they faced directly. A cautious reading of Eldridge, supra, shows the courts discussed delays solely in conjunction with the rate of errors in the termination of existing beneficiaries. The delay discussion in Eldridge, supra, was solely to support the court's perceived difference of standards of "need" present in the Goldberg v. Kelly, 397 U.S. 254 (1970), welfare "need" versus the Social Security claimants' "need." Justice Powell indicated that the "need" of the Social Security claimant was not sufficient to require a further procedure of a pretermination hearing, thereby distinguishing it from Goldberg, supra, need. However, it is surely stretching the point to say by the court's failure to equate the Social Security claimants' "need" to a Goldberg, supra, "need" that the decision precludes all due process claims based upon "need." Nowhere can this be found in reading Eldridge, supra, ^{7/} The issue of delays in the Social Security structure must be considered as the next question to be faced by the courts. The lack of standards by the Social Security Administration surely contributes to the "unreasonableness" of the present hearing procedures: Eldridge, supra, is not of significant consequence to the plaintiff's cause of action.

^{7/} The Eldridge Court acknowledged that OASDI-only applicants are generally needy: "The potential deprivation here is generally likely to be less than in Goldberg, although the degree of difference can be overstated." 96 S. Ct. at 906.

Within Eldridge, supra, we find language that hints if the question would come before the court that they would find the question of delay of constitutional significance. As Justice Powell stated:

As we recognized last Term in Fusari v. Steingberg, 419 U.S. 379, 389 (1975), "the possible length of wrongful deprivation of . . . benefits [also] is an important factor in assessing the impact of official action on private interests." The Secretary concedes that the delay between a request for a hearing before an Administrative Law Judge and a decision on the claim is currently between 10 and 11 months. Since a terminated recipient must first obtain a reconsideration decision as a prerequisite to invoking his right between the actual cut-off of benefits and final decision after a hearing exceeds one year.

In view of the torpidity of this administrative review process, cf. id., at 383-384, 386, and the typically modest resources of the family unit of the physically disabled worker, the hardship imposed upon the erroneously terminated disability recipient may be significant. Id. 341-2.

The defendant's argument that the detriment suffered by the plaintiff is "clearly unsubstantial" because alternative relief is available, dismisses the human hardship so vividly portrayed in plaintiff's accompanying affidavits to this motion for summary judgment.^{8/} The contrast of receiving benefits from the Social Security system versus town welfare must be considered. Initially, under the Connecticut system of general assistance, the level of payments in each of the towns varies dramatically. Mrs. Lockwood's affidavit shows that she suffered a severe weight loss because the

^{8/}

George White's affidavit indicates a severe mental and emotional hardship as a result of the long delay he experienced. (App. 70-1a)

funds she received were insufficient. The mental and moral anguish of living off the town "pauper fund" is amply displayed in each of the affidavits. On town assistance, each recipient must show up weekly to receive vouchers or checks to eat and have a roof over their head. Further, the loss of human dignity and respect of those that have worked to be free, independent, and productive citizens and who suddenly become beggars for public funds because of bureaucratic footdragging is severe.^{9/} By contrast, the Social Security check comes directly to the home once a month. The moral approbation so strongly present in the "welfare" check is not present in the Social Security system. It is admitted that alternative relief is available for the potential claimant. But to say because this patch/work inadequate relief is available negates plaintiff's constitutional claim of a denial of due process is pure fantasy. Defendants here contribute to the worsening condition of the claimant by simply and coldly casting the claimant adrift in society to fend for himself while they take their "torpid" time to decide if his claim for disability is or was sufficient. The plaintiff's deprivation alleged may not reach the standards of "need" to require another pretermination hearing, but to label the present "deprivation" as so clearly unsubstantial as not to require due process protection is clearly erroneous.

The defendant also relies on the recent decision of Milne v. Levine, 424 U.S. 577, 1976, to buttress the lack of substantiality that the delay question presents. In Milne, supra, the plaintiff

^{9/} Congress has found that the Social Security disability program is designed to protect Americans from "the fundamental hazards which would otherwise destroy their earning power and reduce them to beggary." 1956 U.S. Code Cong. and Admin. News, 3942.

alleged that since the fair hearing process for general assistance took 90 days to complete and that the ineligibility period was only 75 days, the hearing was "meaningless". The only similarity here in White is that we are discussing a hearing.^{10/} The plaintiff here alleged that the Administrative Law Judge hearing is most important, since this is plaintiff's first opportunity to prove his subjective qualifications. Contrary to Milne, supra, at no time is the plaintiff qualified by a mere passage of time. In Milne, supra, the information provided by the applicant can cause a 75 day disqualification. But at the 75th day, he becomes eligible for the program. Further, plaintiff can challenge the disqualification and "the applicant has the right to appeal and to receive a full hearing." Here, the plaintiff's remedy is solely to the Administrative Law Judge hearing. By the inordinate delay, he gains nothing and this is certainly in contrast to the procedure in Milne, supra.

In the District Court decision below, it was felt that the plaintiff's claims were significant to require due process protections and not precluded by the lack of "property" interest established in Eldridge, supra.

It cannot be persuasively maintained that a pattern of extended delay in the completion of hearings before an Administrative Law Judge is but a matter of small consequence to such aggrieved applicants. (App. 95a)

In the context of the facts and circumstances of this case, a prompt hearing on the issue of disability is an essential ingredient of a fair and meaningful determination of the claimant's rights.

^{10/} Levine was decided only as to New York State Home Relief applicants. The Social Security Act and the Administrative Procedure Act were not in consideration. The Supreme Court specifically stated:

The court below enjoined enforcement of §131(11) and 18 N.Y.C.R.R. §385.7 with respect not only to Home Relief applicants, but also to applicants for

The "brutal need" of the claimants necessitates more stringent due process restraints on the Government than would otherwise be the case, Cf. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

Due process requires a determination of what is fundamentally fair under any given set of circumstances. "The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." Goldberg v. Kelly, supra, at 268-69. In Goldberg, the regulations provided for a fair hearing within 10 or 12 days after requesting it, and a decision that would be rendered within 12 working days thereafter. Id. at 269 n. 5. If it were unconscionable and violated due process to terminate benefits without a prior hearing in Goldberg, it is clearly unconscionable and violates due process to force the plaintiffs to endure delays of up to ten months for a determination of their eligibility.

The fact that Goldberg, involved the discontinuance of existing benefits does not lessen the validity of its impact on the due process considerations here. A claimant whose eligibility is being determined for the first time is no less entitled to a timely hearing. Moreover, the plaintiffs herein clearly satisfy the Roth standard of "a legitimate claim of entitlement." Supra, pages 46-47.

As the Supreme Court later made clear, the welfare recipients in Goldberg had a claim of entitlement that was "grounded in the statute defining eligibility" and although they "had not yet shown that they were, in fact, within the statutory terms of eligibility

cont.

Aid to Families with Dependent Children, despite the fact that no applicants for AFDC were before the court. Both appellant and appellees agree, though for different reasons, that the court below erred in adjudicating the constitutionality of the presumption as applied to AFDC applicants. Our disposition of this case obviates any need to pass on this issue.

... they had a right to a hearing at which they might attempt to do so." Board of Regents v. Roth, 408 U.S. 564, 577 (1972). In Barnett v. Lindsay, 319 F. Supp. 610, 612 (D. Utah 1970) a three-judge district court held that the procedural due process requirement for an evidentiary hearing must be available to applicants seeking review of initial denials of benefits, and wrote:

As such, summary denial of welfare assistance cannot be distinguished from summary termination. Just as the entitlement is created by statute for the benefit of needy persons meeting specified qualification, so the rights surrounding that entitlement are created when the statutorily defined need arises and not after the benefits have been dispensed. Consequently, it is at this time that the constitutional protections surrounding those rights might be first applied 319 F. Supp. at 612 (Emphasis added)

Because of what is at stake for the welfare applicant, it is crucial that the initial determination be subject to swift review at a hearing. "The greater the level of deprivation which may flow from a decision, the less one may tolerate the risk of a mistaken decision." Arnett v. Kennedy, 416 U.S. 134, 201 (1974) (White, J., concurring and dissenting).

In the case at bar, the plaintiffs were denied benefits after interviews at their local Social Security offices and informal reconsiderations. The person conducting the interview did not make the determination of ineligibility. The fact-finders who made the initial and reconsideration determinations could not go beyond the record of the interview. The applicant was finally given only

a perfunctory form letter concerning this ineligibility. The District Court found that the level of the plaintiffs' deprivation was sufficiently great to merit a timely review hearing and decision dates.

C. The District Court Applied the Correct Standard in Deciding the "Error" Rate in This Matter.

The defendant has raised the issue of whether the statistics of the reversal rate of the entire process of social security is applicable to the case at bar, or as the District Court applied; only the reversal rate of the particular hearing structure involved. The District Court here correctly applied the relevant analysis:

To judge from the number of reversals at the Administrative Law Judge stage of appellate review, the "error rate" in Social Security Administration disability determinations is substantial. The incidence of reversals by Administrative Law Judges exceeds 50 percent of all the cases heard.^{11/} The reversal rate is much lower, to be sure, when measured against the total number original denials, many of which are not appealed.^{12/} However, with respect to those individuals who feel sufficiently aggrieved with the agency's decision to seek an appeal (the relevant class in this case), the prospects of a reversal are substantial. (App. 95a)

^{11/} Committee on Ways and Means, Staff Report on the Disability Insurance Program 1 (July, 1974).

^{12/} Defendant's Memorandum of January 30, 1976, at 27. If measured against all initial denials of disability, the relevant error rate is approximately 13.5%. If only appeals before the Hearings and Appeals Bureau administrative law judges are considered, the reversal rate becomes a much larger 51.6%.

The District Court's reliance on 51.6 percent as the reversal rate is consistent with Eldridge, supra. The focus of inquiry of the Court in Eldridge was to determine if the Social Security system was meeting the applicable due process reliability and fairness standards. As the Court stated:

As we indicated last Term in Fusari v. Steinberg, 419 U.S. 379, 383 n. 6 (1975), in order fully to assess the reliability and fairness of a system of procedure, one must also consider the overall rate of error for all denials of benefits. Id. at 346.

Surely it must be admitted by the defendant that the system we are challenging is the Administrative Law Judge mechanism.

What relevance the reversal rate of reconsideration hearings would have upon the problems of delay presented here is difficult to discern. The defendant cannot have it both ways, as the facts show the plaintiff, George White, began his quest for reversal on February 3, 1974, in which he finally succeeded to reverse the termination decision at the Appeals level during December of 1975. Obviously, if the plaintiff attempted to use the entire time span as a basis of delay of the "system" the statistical analysis of reversal for the entire system would be relevant. However, the challenge is to one portion of the structure and only that reversal rate is in question here.

In discussing the high reversals at the hearing level, Social Security Commissioner James Cardwell, stated:

The reversal rate--now approximately 50 percent--is, of course, disturbing, since it seems to indicate, on its face, that there should be more favorable decisions at a lower level. However, the rate must be considered in the light of several important factors, not all of which are fully understood.

First: In evaluating disability, various judgmental, interrelated medical, vocational, and educational factors accounts for differing actions at differing times and differing levels.

Second: We are evaluating a particular person not an average person, and each person is somewhat different--and the uniqueness of this individual can be brought into better focus in the individualized hearing process.

Third: In most instances the claimant and the decision maker first come face to face only at the hearings level. This provides the decision maker with the best opportunity to observe the claimant and to fully inquire into the person's condition. All these factors, in my opinion, play a significant role in the reversal rate, and thus a favorable decision at the hearings level does not necessarily mean that the prior decision was in error at the time made. (Emphasis supplied) (Appeals Hearing Attachment B, pages 43-44).

Based upon the foregoing, it must be argued that the Court applied the particular statistics to the particular portion of the hearing process challenged, any other analysis would prove to be outside the scope of the challenge before this Court. As Judge Clarie stated in the White decision:

. . .there is a difference in the relevant likelihood of error. Eldridge never filed for a hearing before an Administrative Law Judge, and thus the relevant error rate to consider in his case, as pointed out by the Court, was the incidence of reversals with respect to all disability denials. The class in this case, by comparison, consists only of individuals who have taken an appeal. With respect to this class the relevant error rate is far higher than was the case in Eldridge, and indeed exceeds 50 percent. (App. 105a).

D. The Government's Interest

The defendant in his brief attempts to portray his efforts to improve the delay now suffered as sufficient enough to thwart judicial interference. However Judge Clarie in *White*, supra, and Judge Allen in *Blankenship*, supra, ruled against the government each stating their reasons. Judge Clarie:

It has been demonstrated that improvements are possible through which the backlog of Social Security Administration appeals cases may be reduced. There is undeniably a cost associated with such improvements, and the Court is mindful that setbacks may occur despite ardent efforts to avoid them. Nevertheless, the question is not whether there shall be costs incurred, but who shall bear them while the governmental machinery responsible for providing appeals puts itself in order.

When the government does not act with reasonable promptness, those claiming total disability are required to bear an unreasonable delay and suffer unwarranted deprivation of that which is lawfully theirs. The Court finds that the lengthy and persistent delays experienced in the Title II disability appeals system in Connecticut averaging 211.8 days between January 1973 and March 1975 (moreover, the intervenor Alice Lockwood was required to wait 376 days for a decision) are unreasonable. Such delay denies due process rights to aggrieved applicants and conflicts with the statutory purposes and provisions of the Social Security and Administrative Procedure Acts. These acts require that the Agency act with reasonable dispatch. (App. 106a).

Judge Allen reasoned similarly:

While the defendant is concerned with additional costs in the administration of the program, it has become obvious by virtue of Congressional action that such additional costs have already become necessary, in light of the tremendous case burden imposed upon the defendant. In order to meet the large backlog pending in the defendant's office, Congress has already seen fit to increase the personnel available to the defendant to process claims, as well as modern equipment, which will help in the prompt disposition of such claims. The defendant is already required by law to provide a reasonable opportunity for a hearing, and we do not believe that he can successfully plead increased costs as a valid defense to the violation of the Congressional right, and to the violation by him of statutory mandamus, even though such violation does not spring from ill will toward the plaintiff class, but simply from a lack of manpower provided with which to resolve the claims of the plaintiff-class. *Blankenship v. Mathews*, supra.

The relief ordered by the District Court is most reasonable. It was styled to give to defendant an opportunity to implement the structure without a considerable burden. The phase down allows a gradual reduction, giving the defendant an adequate opportunity to work down to the Court-ordered time limits. The final time limits ordered by the Court are 30 days above the 90 day time limit the Agency set as its "reasonable" response time to Administrative Law Judge appeals.

Plaintiffs are not seeking to impose the costs of an additional administrative process upon the defendants herein. They are already required by statutory directives to provide the hearings challenged, and Congress must take the costs incidental to the mandated hearings into budget perspective.

Delays wrongfully deprive plaintiffs of their statutory right to a hearing and deny needed benefits to those applicants who are

determined eligible for benefits. Subsequent payments of retroactive benefits cannot ameliorate the suffering and hardships caused by the long waiting period. The government must provide the administration of the Social Security system in a fair, equitable and efficient manner as possible. Plaintiffs submit that the District Court decision will guarantee the above results. The facts alleged to this Court justify the lower court's conclusion that the defendant has violated plaintiff's right to due process of law by failing to provide hearings and decisions within a reasonable time.

VIII.

THE RELIEF ORDERED BY THE DISTRICT COURT FALLS WITHIN
THE PARAMETERS OF "JUDICIAL RESTRAINT" DESCRIBED BY
THE UNITED STATES SUPREME COURT

The defendant in his brief argues that the court should have deferred to the present agency and congressional efforts to remedy the present harm caused by the delay situation.

A. Agency Efforts

In reference to the Agencies' efforts (Dr. br., pages 4-11), the plaintiff, as Judge Clarie, laud the improvements already made by the defendant.

However, the many improvements also show how much improvement was needed, and how much still needs to be done, given the large continuing backlog.^{11/} These reforms reveal that it is feasible for the Agency to process claims more rapidly with a relatively small increase in the number of Administrative Law Judges. The crucial problem remains - inadequate number of Administrative Law Judges and support staff for those judges. These reforms do not make the hearing process "reasonable". The basic problem of past, present, and future delays remains. Plaintiffs believe that the defendants' record is not one of scheduling hearings within a reasonable time; nor is "reasonableness" an issue for the defendants to decide completely by themselves. The opinions of the claimants - those adversely

^{11/} See page 10, Plaintiff's Brief.

effected by the long delays - and the opinion of the federal judiciary, which has a duty to assure compliance by the unelected members of the executive branch with the mandates of Congress, should not be muted in deference to what the defendants alone feel is reasonable.

The defendants maintain that the Court should not compel them to act within a certain time period since that would disorganize their reforms. Yet we are asked to allow the plaintiffs to suffer while the Agency reorganizes. A strict time limit is an incentive to continue needed improvements until a "reasonable" time period is achieved.

Federal courts have had little patience with any government agency's excuses for delays caused by inadequate staffing or inadequate funding when these inadequacies created statutory and/or constitutional violations of the applicant's rights. Time limits have either been created by courts or enforced by courts to protect claimants. In Phillips v. Dawson, 393 F. Supp. 360 (W.D. Ky., 1975), the Court required a time standard for processing initial uncontested applications although the state defendants were understaffed and had suddenly been swamped by many claimants who had become unemployed because of the recession. Phillips was based on California Department of Human Resources v. Java, 402 U.S. 121 (1971), in which the Supreme Court held that certain new administrative procedures created by the State unemployment insurance agency violated the "when due" clause of the Social Security Act, 42 U.S.C. §503(a)(1) even though there were no explicit time requirements within which the agency had to act.

The state agencies, under the previous Aid to the Disabled program, were required to render decisions in disability cases within 90 days of the request for a hearing. 45 C.F.R. §205.10 (a)(16) (1974); cf. Nelson v. Sugarman, 361 F. Supp. 1132 (S.D. N.Y. 1972). Surely, the Congressional desire to improve the disability system meant that the system could and should actually work.

Time limits have been established for resolution of due process hearings in welfare cases, where eligible claimants also are in "brutal need" of benefits. In Labbe v. Norton, (U.S.D.C. Conn. Civil No. H-136, 1974) it was held that underestimating the number of applications was no excuse for scheduling due process welfare hearings more than 90 days after requested. The Labbe court also stated that predicted later improvements by the agency did not excuse current delays. Nor was the protection of retroactive payments enough to abate the current injury of delay and resulting non-payment to eligible claimants.

Defendants maintain that strict scheduling from the date they are requested will penalize claimants who must submit additional evidence. Clearly there is a good cause exception for delays caused by the claimant; the time period is extended by the total number of days of such delays. Such delays include the claimant's delay in submitting evidence, briefs, or other statements, and postponements or adjournments at the request of the claimant. (App. 122a).

The time limits formulated by the Court were a remedy that was within the discretion of the District Court to create. In identical

cases to this case, Barnett v. Weinberger, No. 74-270 (D.Vt. 1975) and Blankenship, supra, district courts have found extensive delays to be unreasonable and unlawful under the Social Security Act.

B. The Congressional Response

Recent Congressional action supports plaintiffs' argument that the defendants have violated for years the Congressional requirement of scheduling hearings within a reasonable time. In response to wide-spread concern over the delay problem, on January 2, 1976, Congress passed P.L. 94-202:

"... an emergency bill designed to take the most effective action that can be taken immediately to help reduce the enormous backlog of social security appeals cases now [Sic] pending within the Social Security Administration, H.R. 94-679, 94th Cong. 1st Sess., 1975, p. 2 (emphasis added).

The reason the Committee recommended this relatively limited bill was that it "... could be enacted into law this year. Additional amendments might have the effect of complicating and making the bill more subject to controversy." H.R. 94-679, 94th Cong., 1st Sess., 1975, p. 2.

The basic thrust of the Bill was to allow Supplemental Security Income only and Black Lung judges to become Administrative Law Judges. These judges then could hear Title II cases:

The Committee bill also grants authority for those Supplemental Security Income hearing examiners (who have been appointed under section 1631(d)(2)) to hear cases under Titles II, XVI, and XVIII until December 31, 1978, as temporary Administrative Law Judges if the Secretary of Health, Education and Welfare finds it will promote the achievement of the objectives of these titles. It is the Committee's understanding that the Secretary will make this finding as to the hearing examiners who have been appointed. The Committee also understands that now virtually all the twenty Black Lung judges hold SSI hearing examiner appointments and this would provide the Bureau of Hearings and Appeals the 200 judges it needs to reduce the backlog. Furthermore, by the end of 1978, all SSI examiners will have acquired sufficient adjudication experience to meet the experience requirement for appointment as regular Administrative Law Judges. They would, as they met the experience requirement, be afforded the opportunity to be placed on the register for regular Administrative Law Judge appointment on a merit basis under the regular Civil Service procedures. H.R. 94-679. 94th Cong., 1st Sess., 4 (1975).

It was predicted that this reform would reduce the backlog so that by approximately May, 1977, appeals would be processed within ninety days after initial request, H.R. 94-679, page 2. Congress had been told by the Social Security Administration that this reform would allow the Social Security Administration to meet the 90 day time limit, Hearings, Exhibit C to Appendix, page 74.

The Committee also recommended that the Social Security Administration authorize the Center for Administrative Justice to initiate a study of the existing appeals procedure and offer recommendations concerning possible structural changes in the existing system. Finally, the committee indicated that it would consider the appeals process in depth in the next session of Congress. However, it did not

pass Rep. Seiberling's proposed legislation, H.R. 5276, that would have required appeals to be processed within 120 days.

Defendants claim that this limited action shows that Congress implicitly approved or tolerated the past and present delays as being "reasonable". What this Act really showed was Congressional dissatisfaction with the defendants' past performance, and Congressional desire to act immediately to improve the problem without getting bogged down in political controversy. The record of the House Hearings is filled with examples of Congressional dissatisfaction with the existing Social Security Administration system:

"The frequently long delays imposed on Social Security claimants, before they can have their rights adjudicated by hearing officers as required by the Social Security Law, is often cruel and harmful.

For economic justice to be delayed weeks and even months for elderly and needy Americans is clearly justice denied."

Statement of Honorable Joseph E. Karth, a Representative in Congress for the State of Minnesota, House Hearings, Exhibit B to Appendix, page 90.

Congress stated that it had not concluded resolving the problem. The tentative and limited nature of the Act implies that the issue has not been foreclosed to either continued judicial or congressional supervision.

Congress had been told that its limited reform would enable the Social Security Administration to process claims within 90 days.

Relying on that information, Congress passed P.L. 94-202 in hopes that that bill would solve the hearing crises and support the basic Congressional requirements of prompt scheduling of hearings. Unfortunately, Congress' bill, passed with the advice of the Social Security Administration, has failed to do the job. This Court is not bound by Congressional action based upon hopes and assumptions that have not materialized. This Court should finish the job that Congress has begun to require Social Security Administration to process hearings within a reasonable time.

In support of their "justiciability argument" that Congressional action bars judicial action, defendants cite F.C.C. v. Pottsville B. Company., 309 U.S. 134, (1948). Yet the very passage they refer to states:

"... legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the court." Id. at 146 (Emphasis added)

That language shows that both Congress and the judiciary have a joint duty to insure that unelected administrative officials comply with the law and with the Constitution. Congress and the Judiciary are not mutually exclusive. Simply because one branch has made a partial reform does not foreclose the other branch from acting at all, especially when significant rights are at stake.

The Supreme Court has been active on other matters recently which deal with questions of the limits of the equitable power of courts. The case of Carla Hills v. Dorothy Gautreaux, et. al., 425 U.S. 284, decided April 20, 1976, concerned itself in part with the

responsibilities which the Department of Housing and Urban Development failed to discharge in connection with discriminatory housing policies in and around the City of Chicago.

As a part of *Gautreaux*, supra, the Court dealt with the question of judicial restraint when faced with federal agencies which have violated constitutional and statutory mandates. *Gautreaux*, supra, at 297. In upholding the legality of the lower court's order compelling the Department of Housing and Urban Development to enact policies which would effectively disperse the minority population into the suburbs of Chicago, the Supreme Court reiterated its strong position in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. at 15:

Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies. *Gautreaux*, supra, at 297.

It must be emphatically stated that *Gautreaux*, supra, was decided after *Eldridge*, supra, and so must be seen as limiting and narrowing the seemingly broad grant of discretion to the Social Security Administration defendant finds in *Eldridge*, supra. To permit constitutional and statutory violations to continue in this matter because of the limitations on judicial action allegedly found in *Eldridge*, supra, would transform that limitation on the exercise of federal judicial authority into an arbitrary and mechanical shield for those found to have engaged in obstructive, illegal and unconstitutional conduct.

The Secretary's contention here that he alone knows best how to administer the Title II program is camouflage for the facts. The Title II disability insurance statutes were enacted in 1956, twenty years ago. The Administration has steadily become more and more torpid in responding to requests for hearings to the point where the average delay now approaches one year. The Secretary and his predecessors have had twenty years to solve a problem and they have failed. They now apparently want this court to give them another chance claiming "that the administrative process must have a reasonable opportunity to evolve procedures to meet needs as they arise." (Dr. br., page 30) The backlog of hearing requests has grown continually, the statutes have been in effect for twenty years, and the Secretary still wants more time. We submit that the twenty years is long enough. As Judge Clarie concluded in *White*, supra:

When the government does not act with reasonable promptness, those claiming total disability are required to bear an unreasonable delay and suffer unwarranted deprivation of that which is lawfully theirs . . . Such delay denies due process rights to aggrieved applicants and conflicts with the statutory purposes and provisions of the Social Security and Administrative Procedure Acts. These acts require that the Agency act with reasonable dispatch. (App. 106a).

C. The District Court's Order of Prospective Payments Assures Compliance of Its Order and is Within the Congressional Purpose of the Social Security Act.

The District Court in its order granted "prospective payments to those claimants who fail to receive their final decision within the maximum delays expressed in paragraph (1)." (App. 115-16a).

Further, based upon Judge Clarie's order, the first effective date of the prospective payment is December 31, 1977. At that time if any petitioners for a hearing whose hearing and decision has been pending for more than 180 days, the prospective payment on a month-to-month basis begins. These payments are limited to the monthly amount that the claimant would receive if found disabled and are immediately terminated once a decision is rendered. (App. 117a).

The Court also provided the defendant with two other protective devices that render the prospective payment structure most reasonable. First, included within the order is a clause allowing the Social Security Administration to recover payments made under the Court's

order. (App. 117a) Secondly, the Court provided four circumstances that allowed the defendant to take the request out of the penalty structure.^{12/}

Also included within the Court's order is a provision that allows the Administrative Law Judge, upon his own judgment and discretion, to remove the case from the maximum time-sequence prospective payment. This provision can be exercised by the Administrative Law Judge during the hearings. The order states:

The Administrative Law Judge as a result of evidence adduced at the hearing or in the course of his post-hearing review in good faith determines that a consultative medical examination or additional medical evidence in the possession of third parties is required. (App. 118a)

The defendant proffers several reasons why the prospective payment structure should be reversed. The impediments he offers are statutory, 42 U.S.C. 405(q)(5) and 205(1), and congressional.

Under 42 U.S.C. 405(q) the purpose of Congress was to provide "expedited benefit payments" to certain classes of individuals. The primary emphasis are to those individuals that are to receive retirement benefits. However, even in the testimony recited in the defendant's brief (page 18) a close reading shows that Congress specifically

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- ^{12/} (a) Directly causes a delay by his or her own failure to provide essential information for adjudication;
(b) Requests a delay;
(c) Fails to appear for scheduled hearing; or
(d) See above quotation.

exempted disability because they did not wish to establish a rushed judgment upon the disability of the applicant.

Clearly, the scope of the order here is limited and does not cause a hasty judgment on the status of disability. The prospective payment is narrowly applicable on a monthly basis and instantly terminates once a final decision by the Administrative Law Judge is rendered. Further, the defendant is empowered to recover the monies he expended if he prevails on the Administrative Law Judge hearing decision.

Under the equity power of the Federal Court, the District Court had the power to shape relief in the most balanced and effective manner possible. As stated by the United States Supreme Court, in discussing a court's power to shape relief:

. . . reviewing courts are also charged with the duty to construe legislation in light of ascertained Congressional policy. "[They] are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. NLRB v. Brown, 380 U.S. 278, 291.

The prospective relief portion of the District Court's orders serves as the measure of compliance. Succinctly stated, without the prospective provision the order of the court would have less affect upon the actions of the defendant. It would also require contempt motions to be filed for violations for each and every individual class member. Surely, that would not be a competent way to handle the possible non-compliance in each situation.

The plaintiff feels the District Court's order is a reasonable and justifiable response to the hearing delay problem. The minor problems caused by the prospective payment pale by comparison to the hardship caused to the plaintiff. The District Court applied the proper balancing test in this matter.

IX.
JURISDICTION

A. Plaintiffs' Challenge to Excessive Delays in Obtaining Hearings is Not a "Claim Arising Under" the Social Security Act Within the Meaning of 42 U.S.C. 405(h).

The District Court expressly held that 205(h) of the Social Security Act, 42 U.S.C. 405(h), does not bar the court from assuming jurisdiction of this case outside of the limited review provision of 42 U.S.C. 405(g). Finding that the conditions for mandamus jurisdiction under 28 U.S.C. 1361 were satisfied, the court declined to consider alternative bases of jurisdiction.^{13/}

Plaintiffs argue that this lawsuit is not "a claim arising under" the Social Security Act within the meaning of 405(h)^{14/}, and therefore, jurisdiction under 1331 or 1361 is proper. The defendant's jurisdictional arguments are premised on the representation that this action is one to recover on a claim to seek benefits, and that this suit is but an indirect method to gain review of the merits of their disability claims. Defendant further argues that since 405(h)

^{13/} In light of Sanders v. Weinberger, 45 U.S.L.W. 4209 (February 23, 1977), plaintiffs no longer assert jurisdiction under the Administrative Procedure Act (APA).

^{14/} "(h) The findings and decision of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No finding of fact or decision of the Secretary shall be reviewed by any person, tribunal, or government agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof, shall be brought under Section 24 of the Judicial Code of the United States to recover on any claim arising under this title." [Emphasis supplied.]

precludes judicial review of the merits of the claim under Section 24 of the Judicial Code, plaintiffs have no recourse to court, except under 42 U.S.C. 405(g) after exhaustion of all administrative procedures.

The meaning of the critical phrase "to recover on any claim arising under [Title II of the Social Security Act]," in 405(h) was discussed at great length in Weinberger v. Salfi, 422 U.S. 749, 95 S. Ct. 2457 (1975). The Supreme Court found determinative the fact that the judgment of the District Court directed the Secretary to pay Social Security benefits. In the case at bar, plaintiffs sought declaratory and injunctive relief only, to compel the Secretary to provide hearings on their claims within a reasonable time, irrespective of the merits of those claims.

Salfi requires that all judicial review of findings or decisions of the Secretary be brought exclusively pursuant to 405(g), which provides, in part, that:

"Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain review of such decision by a civil action commenced within sixty days after the mailing to him of such decision or within such further time as the Secretary may allow . . . As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision are based . . . "

Even a partial reading of this section makes obvious the fact that the unreasonable delay in hearings challenged here is not the type of final decision contemplated by these procedures.

In Salfi the primary concern was that the constitutional issue might be avoided, since at the administrative level the claimants might possibly prevail or be denied benefits on independent grounds. Review of a claim under 1331 and 1361 in that situation should be precluded, because Congress intended to prevent a by-pass of the procedures set up in the Act. It cannot be seriously contended, however, that plaintiffs are here seeking to by-pass administrative procedures, since the remedy they seek is that those procedures be available to them without unreasonable delay.

In Mathews v. Eldridge, 424 U.S. 319 (1976), the Supreme Court again discussed sections 405(g) and (h). Eldridge, like Salfi, found its jurisdictional base under 405(g), governed by its "final decision" requirement. Defendant contends that Salfi is determinative of their assertion that 1361 jurisdiction is completely precluded by 405(g). Yet because Eldridge expressly reserved opinion on the issue of 1361 jurisdiction, it is clear that the Supreme Court has wished to leave that option available.

This reading of Salfi and Eldridge is consistent with other cases since that decision came down. In particular, Sturgill v. Weinberger, No. 75-288, (E.D.Ky. 1975), involved a similar complaint against Social Security delays, which was also challenged by the Secretary for lack of jurisdiction. The Sturgill court noted that:

the Salfi rationale would unquestionably bar the invocation of mandamus jurisdiction if plaintiffs were seeking in this action review of the merits of their claim and a judgment directing the Secretary

to pay benefits. However, Salfi cannot be deemed controlling and found to foreclose relief sought by these plaintiffs, for they only pray for a judgment compelling the Secretary to take some affirmative action on the processing of their applications (Memorandum Opinion and Order of September 17, 1975, p. 2)

The unreasonable delay in hearings challenged in White is not the type of "final decision" contemplated by Salfi. Plaintiff can hardly petition the Secretary for a hearing on his failure to provide them with a hearing, and has done all that is possible through the administrative procedures made available to them by the Social Security Administration.

Finally, the defendant argues that Salfi would be made an exercise in futility if plaintiff-claimant could circumvent the exhaustion requirement of Section 205(g) simply by bringing suit under 1361. (Defendant's Brief, p. 44). After Eldridge, we see that exhaustion and finality cannot be used to avoid this type of constitutional review of deficiencies in the administrative procedure. The exhaustion requirement was found to be met in Eldridge, and as will be discussed later, would also be met in this case were that requirement applicable. Therefore, resort to outside bases of jurisdiction is not a mere circumvention of any such requirements in this type of constitutional challenge.

The Supreme Court's most recent discussion of jurisdiction under the Social Security Act, Califano v. Sanders, 45 U.S.L.W. 4209, reiterated the basic principle of Johnson v. Robison, 415 U.S. 361 (1974), saying that:

(c)onstitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions Thus [Salfi and Eldridge] merely adhered to the well-established principle that when constitutional questions are at issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the "extraordinary" step of foreclosing jurisdiction unless Congress' intent to do so is manifested by "clear and convincing" evidence (45 U.S. L.W. at 4211)

In Sanders, jurisdiction was available exclusively under 405(g) because it clearly was a "claim arising under" within the meaning of 405(h). Yet jurisdiction was found lacking because it did not satisfy the "final decision" requirement of 405(g). Sanders sought review of the Secretary's decision not to reopen his claim after seven years, alleged to be an abuse of discretion. Sanders had sought judicial review at the time of his initial denial, when it was his as a matter of right. After seven years, the only grounds for reopening under the Social Security regulations would be a finding of either clerical error or error on the face of the record.

The failure of jurisdiction in Sanders only serves to reinforce the principle of Salfi and Eldridge that constitutional challenges require a forum. Had Sanders involved a constitutional challenge to the Secretary's denial of a petition to reopen, a much different result would have been compelled. Because the plaintiff there sought only an additional opportunity to establish that he satisfied the Social Security Act's eligibility standards for disability benefits, 405(g) could not afford subject matter jurisdiction. 45 U.S.L.W. at 4211.

B. The District Court Has Jurisdiction Under 28 U.S.C. 1361.

The three basic conditions for mandamus jurisdiction which the District Court found to be met are (1) a clear right in the plaintiff to the relief sought; (2) a plainly denied and preemptory duty on the part of the defendant to do the act in question; and (3) no other adequate remedy available. Lovullo v. Froehlke, 468 F. 2d. 340, 343 (2d Cir. 1972), cert denied, 411 U.S. 918 (1973). The defendant maintains that mandamus jurisdiction is inappropriate since the scheduling of hearings is discretionary. Plaintiffs believe that the statutory language puts a clear duty on the defendants to schedule hearings within a reasonable time, and that the defendants have failed in their duty.

In similar challenges to delay in scheduling hearings the courts have all found mandamus jurisdiction available. See Blankenship v. Mathews, No. C75-018-LAX (W.D. Ky. 1976); Barnett v. Weinberger, No. 74-270 (D. Vt. 1976); Sturgill v. Mathews, No. 75-288 (E. D. Ky. 1975). Even discretionary acts will fall within the reach of mandamus when an officer has gone so far beyond his discretion as to warrant judicial interference.

The defendant argues that the record establishes that the Secretary has acted "vigorously and innovatively to bring the available resources to bear in resolution of a national problem." Therefore, the Secretary's action or inaction did not greatly exceed his discretion, and the standard for mandamus when discretion is involved was

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not met. Though the defendant may disagree with the District Court's interpretation of the record, the court's conclusions are firmly founded upon the evidence. The long-standing failure of defendants to adequately anticipate ever-increasing caseloads and to provide a sufficient number of hearings officers creates unreasonable delays which are in violation of the defendants' duty. It should also be noted that much of the so-called vigorous and innovative actions of which the defendants boast were established during the pendency of this lawsuit. These actions were considered and taken into account by the District Court in devising the appropriate remedy, but they will clearly not strip the court of jurisdiction already properly invoked.

Defendant also contends that the duty to provide hearings within a reasonable time may not be construed to find a duty within a fixed time limitation. Once the court determines that the Secretary's duty has been breached, it has the broad equitable power to devise an effective remedy, including the ordering of time limitations. The court may determine the outer limits of the Secretary's discretion and what is reasonable under the Administrative Procedure Act, the Social Security Act, and the Due Process Clause of the Fifth Amendment.

C. The District Court Has Jurisdiction Over This Case Under 28 U.S.C. 1331(a).

Congress recently amended 28 U.S.C. 1331(a) to exclude the ten thousand (\$10,000) dollars amount when federal officers are sued,

Cong. Record, October 1, 1976, H-12149. This broadening of federal court jurisdiction, which occurred long after the passage of 42 U.S.C. 405(g), reflects Congressional concern with holding federal officers responsible to the general public through the power of the courts. This amendment should not be undercut by an unnecessarily broad reading of 405(g).

D. Jurisdiction is Also Vested in the District Court Under 42 U.S.C. 405(g).

Alternatively, were the court to determine that 405(h) applied to this case and that jurisdiction under other statutes were precluded by the 405(h) bar to "actions" seeking "to recover on any claim," it would be necessary, as the Supreme Court did in Salfi and Eldridge, to determine whether there is jurisdiction over this action under 405(g). Plaintiffs submit that for the same reasons that the Supreme Court had jurisdiction to consider the claims in Eldridge, this court has jurisdiction under 405(g) to consider their claim here.^{15/}

Plaintiffs' failure to assert such a jurisdictional base below does not now preclude this court from finding it, if alternative bases fail. See C. Wright and A. Miller, Federal Practice and Procedure 214, at 107 n. 4 (1969). In both Weinberger v. Salfi, supra, and Mathews v. Eldridge, supra, the Supreme Court found jurisdiction under 405(g) not

^{15/} In his opinion, note 36, Judge Clarie suggested that jurisdiction under section 405(g) could also have been asserted in the light of the language of the Eldridge opinion. (Joint Appendix, p. 112a).

withstanding the fact that neither plaintiff had alleged such jurisdiction in the District Court. Johnson v. Mathews, 539 F. 2d. 1111 at 1116, n. 4 (8th Cir. 1976).

The plaintiffs in Eldridge, 424 U.S. 319, 96 S. Ct. 893 (1976), argued that their termination from the OASDI disability program without a prior hearing violated due process. The Court held that the plaintiffs satisfied the "non-waivable" requirement of 405(g) since their claim was collateral to the receipt of benefits, since they had a strong interest in prompt resolution of their claim, and since deference to agency action was inappropriate because the issue of constitutionality of the procedures was beyond the defendants' discretion. Eldridge, supra, 96 S. Ct. at 900-901.

In this case the named plaintiff and the members of the plaintiff class have been denied benefits at the reconsideration stage, or have had their benefits terminated. The government's denial or termination of benefits and its continued inability to promptly provide hearings constitute final decisions for the purpose of 405(g). In Tatum v. Mathews, 541 F. 2d. 161 (6th Cir. 1976), the Court held that claimants' termination from Supplemental Security Income without a due process hearing satisfied the "non-waivable" requirement since ". . . some decision was made by the Secretary." Tatum, supra, 541 F. 2d. at 164. Accord, Johnson v. Mathews, 539 F. 2d. 1111 (8th Cir. 1976). See also Himmler v. Weinberger, No. 39294 (E.D. Mich. 1976) (challenging Medicare eligibility procedures).

The plaintiffs have also satisfied the "waivable" requirement of 405(g) as set forth in Eldridge. Their claims are collateral to

collection of benefits. Even if they win the lawsuit, the plaintiffs will not be immediately determined eligible for benefits. The plaintiffs; like the Eldridge plaintiffs, are challenging how their claims are being handled, not if they are ultimately eligible. The plaintiffs' need for prompt hearings presents a claim ". . . where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate." Eldridge, supra, 96 S. Ct. at 900. Complete deference to agency action is inappropriate in this case since the agency does not have the ability or discretion to unilaterally decide legal and/or constitutional time limits within which to process hearings.

To require the plaintiffs to first exhaust all administrative procedures would put them in a vicious circle of being unable to challenge the practice delay until they are no longer injured by the delay, (since they will have finally had their hearing.) The plaintiffs would then face the defenses of mootness and standing, and might never be able to challenge the delays that they suffered, though their class continues to suffer. In a footnote, the Eldridge court stated:

[T]he core principle that statutorily created finality requirements should, if possible, be construed so not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered remains applicable.
(96 S. Ct. at 901, n. 11)

Finally, exhausting the administrative procedures will not provide any of the parties of the Court with any additional information that will help resolve this lawsuit's issue of serious delays in the

availability of the administrative procedures. As in Salfi, the purposes of the exhaustion doctrine have been served when the issue to be decided is one beyond the Secretary's jurisdiction to determine.

E. Congress Did Not Intend to Bar Jurisdiction Completely.

The Supreme Court has required that there be "clear and convincing" evidence of Congressional intent before a statute will be construed to restrict access to judicial review. Johnson v. Robison, 415 U.S. at 373-74 (1974); Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967); Rusk v. Cort, 369 U.S. 367, 379-80 (1962).

The wording of 42 U.S.C. 405(h) implies that not all jurisdiction under Section 24 of the Judicial Code is to be precluded:

No action . . . shall be brought under Section 24 of the Judicial Code of the United States to recover on any claim arising under this title.
(Emphasis supplied)

An action may therefore be brought under Section 24 if it is not "to recover on any claim arising under this title." Had Congress intended to preclude all judicial review for any purpose except as provided in 405(g), it certainly would have made that intent clear, as it made its intent clear in the Veterans Administration Acts.^{16/}

^{16/} See Johnson v. Robison, 415 U.S. 361 (1974), and the legislative history behind the no-review provision of the Veterans Administration Act.

Since a denial of jurisdiction in this case would present serious constitutional questions as to the validity of the statute, Johnson v. Robison, 415 U.S. at 366-7, the court must first ascertain whether the statute may fairly be construed to avoid the constitutional questions. This was not a problem in Salfi, supra, or Eldridge, supra, as the constitutional challenges were not precluded by the prior exhaustion of administrative procedures. In the present case, the District Court properly invoked mandamus jurisdiction; however, if jurisdiction were not available under 1361, a finding of jurisdiction under the alternative of 405(g) would be compelled.

F. This action is not moot as it has been certified as a class action and meets the tests enunciated by the Supreme Court.

The defendant contends that this action has become moot. As authority for his conclusion he relies heavily on the test he alleges is found in Sosna v. Iowa, 419 U.S. 393 (1975). (Appellant's Brief, p. 42).

In Sosna, supra., the plaintiffs, by means of a class action, sought to have Iowa's one year residency requirement for divorce jurisdiction ruled unconstitutional. When the Supreme Court heard the case the one year had long since run for the named plaintiffs. In finding that the matter was not moot in spite of the aforementioned passage of time the Court held that

There must not only be a named plaintiff who has such a case or controversy at the time the class action is certified by the District Court pursuant to Rule 23, but there must be a live controversy at the time this Court reviews the case. The controversy may exist, however, between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot. (Citations and footnotes omitted) Sosna, supra. at 402.

and in so holding declined to find that the plaintiffs' claim had become moot by reason of the lapse of time. The class in Sosna, supra., had been certified before the named plaintiff had met the one year residency requirement.

Subsequent to Sosna, supra., the Court had occasion to consider a permutation of the mootness problem raised and solved by Sosna. In Gerstein v. Pugh, 420 U.S. 103, the Court considered the claim of a certified class of pretrial detainees from the State of Florida who alleged that their continued detention without a hearing prior to trial was a denial of due process of law and therefore unconstitutional. The Court recognized that the matter might well have been moot as to the named plaintiffs even before the class action had been certified but found that since the practice was continued and unregulated and since the attorney for the class was a public defender who surely would have other clients in exactly the same position as the named plaintiffs the action as a whole was not moot, citing Sosna, supra., footnote 11, and Rivera v. Freeman, 469 F² 1159 (8th Cir.).

Very recently the United States Court of Appeals for the Second Circuit ruled on a case quite similar to the one now at bar. In Frost v. Weinberger, 515 F² 57, (1975), the Court discussed this very issue of mootness at great length and determined that because the plaintiff had filed her case as a class action it was still a live case or controversy in spite of the fact that she obtained the relief she had sought before the class had been certified. The Court found that certification of the class had been delayed because the District Court judge

found it exigent to consider and rule on motions for preliminary relief first.

In the instant case an examination of the record will very quickly reveal that the defendant is wasting the court's time with his protestations. The matter is a class action certified before the named plaintiffs obtained the hearing and decision they wanted. The original complaint was filed January 27, 1975. The intervening complaint of Alice Lockwood was filed March 17, 1975. The motion for certification of the action as a class action was filed on March 21, 1975. Oral arguments were presented in May of 1975 and, on July 18, 1975, the class, composed of

all potential Social Security Disability recipients, who have pending motions for a hearing before an Administrative Law Judge and have not had a hearing scheduled promptly and the matter concluded within a reasonable time. (Appendix, p.48a).

was certified.

Plaintiff George White petitioned for an Administrative Law Judge hearing during August of 1974. The hearing was held on April 29, 1975, and a decision was obtained on May 21, 1975. Plaintiff Alice Lockwood petitioned for an Administrative Law Judge hearing on October 15, 1974. On May 12, 1975, Ms. Lockwood had her hearing and on October 27, 1975, over one year after her petition for the hearing was filed, she received notice of a favorable decision from the Social Security Administration.

The defendant's answer to Interrogatory #16, made on June 24, 1975, and uncontroverted today, states the average time delay from the intitial date of an Administrative Law Judge Title

II disability hearing request to entry of a final decision for a period from January, 1973, through March, 1975, in the State of Connecticut was 211.8 days or 7 months. A look at the answer to Interrogatory #6 will show the magnitude of this problem with 679 people in Connecticut having requested Administrative Law Judge hearings in 1974, the last year for which complete figures have obtained.

The defendant has himself set out the tests enunciated by the Supreme Court which are relevant to this inquiry into mootness. It is clear that these tests have been met by the present case.

G. This Is A Properly Certified Class Action

1. The plaintiff and intervenors had a "case or controversy".

The plaintiffs all were persons who experienced long, unexplained delays in scheduling their hearings before Administrative Law Judges (Appendix, p.82a).

The claims of the plaintiffs were not moot when the complaint was filed as a class action (Appendix, p.6a), nor were they moot when the matter of certification was argued. (See Section on Mootness, p , supra). Intervenor Lockwood did not receive her decision after her ALJ hearing until many months after the class was certified. (Appendix, p.83a). Appellant's reliance on O'Shea v. Littleton, 414 U.S. 488 at 494 (1974) is misplaced. The plaintiffs in O'Shea never alleged threatened or actual injury to themselves. O'Shea stands for the principle that the injury or threat of injury must be real and immediate, not conjectural or hypothetical. Id. at 494. The stipulated facts in the present case are ample testament to the actual harm suffered by the plaintiffs.

The question of the propriety of this action being continued although the named and intervening plaintiffs have received their decisions has been conclusively answered in Cerstein v. Pugh, 420 U.S. 103 (1975), footnote 11. It is submitted that the plaintiffs in the instant case are in an analogous situation to the plaintiffs

in Gerstein, the recurrence of the problem for a large class is clear from the figures submitted by the appellant, and the attorneys for the plaintiffs, as legal assistance program employees, can be safely assumed to have many other clients similarly situated. This Court, in Frost v. Weinberger, has summarized its position on this as follows:

Our attention is called to the statement in Sosna:

There must not only be a named plaintiff who has such a case or controversy at the time the complaint is filed, and at the time the class action is certified by the District Court pursuant to Rule 23,¹¹ but there must be a live controversy at the time this Court reviews the case.¹² SEC v. Medical Committee for Human Rights, supra. The controversy may exist, however, between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot.

11. There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the District Court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to "relate back" to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review.

12. When this Court has entertained doubt about the continuing nature of a case or controversy, it has remanded the case to the lower court for consideration of the possibility of mootness. Indiana Employment Security Division v. Burney, 409 U.S. 540 (1973).

419 U.S. at 402 But the apparent force of what was said there in text is largely drained by footnote 11, which was given speedy effect in *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975).¹¹ speaks in terms of "may", it is hard to think of a case more clearly qualifying for inclusion than this one. To hold that the completion of that hearing and rendition of judgment by the administrative law judge rendered the case moot for the class would mean that the important question here at issue could never be decided unless a plaintiff or the SSA engaged in foot-dragging with respect to the hearing sufficiently long to enable a district judge to make a class action determination. Such a principle could have little to commend itself. The reason for generally requiring that the controversy be "live" as to the named plaintiff at the time of class action designation is that otherwise the court would have no assurance that the named plaintiff will vigorously represent the class.

¹¹ In *Gerstein* it was not clear from the record whether any of the named respondents, who challenged Florida procedure which permitted the extended pretrial detention of arrested persons, without a preliminary hearing, solely on the basis of the prosecutor's decision to file an information, were still in custody when the district court certified the class. See *Crow v. California Dep't of Human Resources*, 420 U.S. 917, 54 U.S.L.W. 3451 (U.S. Feb. 14, 1975), vacating and remanding 490 F.2d 58 (9 Cir. 1973).

Supra, at p. 63. .

2. The Class is properly certified and factual variations within the class do not override the common issues.

Common questions of law and fact exist among the class members, and this action has been instituted in order to obtain a decision based upon the presentation of evidence and argument on these questions. The named plaintiff and the proposed intervenors and the class he purports to represent are all seeking Social Security Disability benefits, and they have been unable to work because of serious psychological and physical impairments. These individuals have petitioned for a hearing before an Administrative Law Judge to reconsider the denial of benefits to them by the Social Security Administration of the Department of Health, Education and

Welfare, but they have not had a hearing scheduled promptly. Further, after hearings are held, decisions have not been rendered nor have matters been concluded within a reasonable time from the date of the petition for the hearing.

In light of the common questions of fact outlined above, inevitable factual variances that may arise in any given case regarding the issue of disability are immaterial. Jenkins v. United Gas Corp., 400 F. 2d 28 (5th Cir. 1968). In Jenkins, the plaintiff, seeking an injunction, alleged that the defendant had engaged in plantwide, systemwide, racially discriminatory employment practices in violation of federal civil rights legislation. The Court reversed the judgment of dismissal, stating that even if there were differing circumstances surrounding the jobs and qualifications of different Negro employees of the defendant, the complaint's allegations of systematic discrimination were sufficient for class treatment. The court emphasized that the trial court had the duty and ample power, both in the conduct of the trial and in the relief granted, to treat common things in common and to distinguish the distinguishable.

The various factors cited by the defendant in his Memorandum to justify the delays are matters to be taken up by the Court on the merits, and do not affect the commonality of the wrong alleged and suffered by the plaintiff and the class. The particular

sources and reasons for the delays may vary, but such variations do not affect the consistent factual pattern of delay in the final adjudication of an applicant's claim for disability benefits.

The questions of law involved in this action are also common to the class which the plaintiff purports to represent. The plaintiff alleges violations of 5 U.S.C. 555(b) and 42 U.S.C. 405(b), as well as a denial of his Due Process rights guaranteed by the Fifth Amendment. He is a member of a class of citizens who have requested Administrative Law Judge hearings and who have been severely injured by the defendant's undue delay in the scheduling of hearings and the rendering of decisions within a reasonable time. These laws and the Constitution apply with equal force to every person seeking disability benefits, and the question of whether the defendant has failed in their implementation necessarily affects each class member.

Whether the plaintiff was previously entitled to benefits and then terminated or is a new applicant does not raise a factual distinction which is significant with respect to the property of the certification of a class in this action. "Factual differences are not fatal if common questions of law exist. Rule 23(a)(2) requires that there be common question of law or fact." Like v. Carter, 448 F.2d 798, 802 (8th Cir. 1971) (emphasis added). Like was an action brought under the Social Security Act by public

assistance applicants seeking a declaration that the failure of Missouri state welfare officials to act upon their applications within thirty days of filing thereof denied them due process, equal protection, and their civil rights. The trial court, in Like v. Carter, 318 F.Supp.910(E.D. Mo. 1970) had held that the action could not be maintained as a class action under Rule 23 because facts pertaining to the delay in processing applications varied from case to case. In reversing this determination, the Court of Appeals held that there was properly constituted class for common questions of law such as the validity and interpretation of federal and state statutes. The Court remarked that a class action under strikingly similar circumstances was upheld in Rodriguez v. Swank, 318 F.Supp.289 (N.D. Ill. 1970), aff'd, 403 U.S. 901 (1971).

The delays alleged by the plaintiff and admitted by the defendant, involve the same questions of law as discussed above and result in the same irreparable harm, violations of law, and denials of rights and privileges guaranteed by the Due Process Clause of the Fifth Amendment, regardless of whether they affect the case of a terminated individual or that of a new applicant. Much of the major litigation challenging the administration of public assistance programs has been brought on behalf of classes of recipients. In those cases, the circumstances of the various individuals members of the class were of course different, but all

were affected by a common question of law. See Rodriguez v. Swank, id., Grubb v. Sterrett, 315 F. Supp. 990, 992 (N.D. Ill. 1970), aff'd, 400 U.S. 922 (1970); Solmon v. Shapiro, 300 F.Supp.409, 411 (D.Conn. 1969), aff'd, 396 U.S. 5 (1969).

Faced with differing factual questions and circumstances in various other areas of the law, courts have regularly held that classes were properly represented with respect to common, predominant issues of law and fact. One example of a large number of cases in the environmental field in which classes have been certified is In re Multidistrict Private Civil Treble Damage Antitrust Litigation Involving Motor Vehicle Air Pollution Control Equipment, 14 Fed.Serv.2d 420, 7 A.L.R.Fed. 907(D.Cal. 1970). In upholding a class represented by a wide range of individuals and interests suffering damage from air pollution, the court recognized the differences in the effect of smog on various crops or fauna of a state, political subdivision, public corporation, or public authority. Nevertheless, the court ruled that the pleadings did allege a class properly represented with respect to common issues of law and fact which predominated over questions affecting only individual members. While recognizing problems as to the manageability of the various sub-classes, the court held that

[u]ntil management was recognized as impossible or nearly impossible, the imagination and ingenuity of the litigants, counsel and court would be depended upon to solve the complex problems anticipated in the litigation, since the economics of time, effort, and expense would more than compensate the efforts if it were successful. Supra , at 09.

In another case involving employment discrimination, Hicks v. Crown Zellerbach Corp., 49 F.R.D. 184 (D.La. 1968), the court also dealt with factually different circumstances for each member of the class as to seniority, ability, and job position, and with varying factors affecting the defendant's actions as to each individual employee. Here too, however, the court certified the class, stating that the action sought to put the court in a position to render a broad remedial order against the established discriminatory policy, apart from and regardless of the individual circumstances of each employee. See also Jenkins v. United Gas Corp., supra; Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969).

While it is entirely possible that no two situations involving petitions for an Administrative Law Judge hearing by applicants for Social Security Disability benefits are factually identical, it is undeniable that the delays in the scheduling and dispositions of these hearings raise questions of law common to the proposed class. Accordingly, the prerequisites of Rule 23(a) (2) have been met.

CONCLUSION

The defendant has had sufficient time to correct the delay deficiencies amply displayed in the record of this case. The agency's lack of ability to provide the plaintiff with an Administrative Law Judge hearing and decision within a "reasonable" period of time amounts to a violation of the Social Security Act, Administrative Procedure Act and their due process rights under the United States Constitution. For these and for the reasons stated above, it is respectfully submitted that the decision and relief ordered by Judge Clarie should be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of April, 1977, I served the foregoing Brief for the Appellant, by mailing copies, postage prepaid to:

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